(9)

No. 88-333-CSY
Status: GRANTED

Title: Alabama, Petitioner
v.
James Lewis Smith

Docketed:
August 24, 1988

Court: Supreme Court of Alabama

Counsel for petitioner: Bjurberg,Paul David

Counsel for respondent: Cason,John C., Smith,James L., Boyd,Delores

Entry	Date	Note	Proceedings and Orders
1	Aug 24 1988	G	Petition for writ of certiorari filed.
2	Aug 24 1988		Appendix of petitioner Alabama filed.
3	Sep 28 1988		DISTRIBUTED. October 14, 1988
4	Oct 13 1988	P	Response requested -- TM. (Due November 12, 1988)
5	Nov 22 1988		Brief of respondent James Lewis Smith in opposition filed.
6	Nov 22 1988	G	Motion of respondent for leave to proceed in forma pauperis filed.
7	Nov 30 1988		REDISTRIBUTED. January 6, 1989
8	Jan 9 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
9	Jan 9 1989		Petition GRANTED.
			**********
10	Feb 21 1989		Record filed.
		*	Certified copy of original received.
11	Feb 22 1989		Brief amicus curiae of United States filed.
13	Feb 23 1989		Joint appendix filed.
15	Feb 23 1989		Brief of petitioner Alabama filed.
12	Feb 27 1989	G	Motion of respondent for appointment of counsel filed.
14	Feb 27 1989		DISTRIBUTED. March 3, 1989. (Motion of respondent for appointment of counsel).
18	Mar 1 1989	G	Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
16	Mar 6 1989		Motion for appointment of counsel GRANTED and it is ordered that Delores Boyd, Esq., of Montgomery, Alabama, is appointed to serve as counsel for the respondent in this case.
17	Mar 8 1989		SET FOR ARGUMENT, APRIL 24, 1989. (3rd CASE)
19	Mar 20 1989		Motion of the Acting Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
20	Apr 5 1989		CIRCULATED.
21	Apr 6 1989	X	Brief of respondent James Smith filed.
22	Apr 15 1989	X	Reply brief of petitioner Alabama filed.
23	Apr 24 1989		ARGUED.

(1) NO. 88-333

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court
FILED
AUG 24
JOSEPH F. SPANIOL
CLERK

OCTOBER TERM, 1987

STATE OF ALABAMA,

RESPONDENT,

VS.

JAMES LEWIS SMITH,

PETITIONER.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OF

DON SIEGELMAN
ALABAMA ATTORNEY GENERAL

ROSA HAMLETT DAVIS
ALABAMA ASSISTANT ATTORNEY GENERAL
CHIEF OF THE APPEAL DIVISION

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether this Court should grant certiorari to resolve a split among the lower state and federal courts on the question of whether North Carolina v. Pearce, 395 U.S. 711 (1969) applies where a defendant's guilty plea is withdrawn and, after a trial, he receives a greater sentence than he would have under the withdrawn plea bargain?

II. Whether this Court should grant certiorari and overrule the opinion of the Alabama Supreme Court which misapplied federal constitutional law by presuming judicial vindictiveness merely because the Defendant received a greater sentence after trial than he would have had he pleaded guilty?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The opinion of the Supreme Court of Alabama reversing respondent's conviction is not yet reported, but is reproduced as Appendix A to this petition.[1]

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[1]The appendix to this petition is separately bound pursuant to Rule 21.1(k).

JURISDICTION

The judgment of the Supreme Court of Alabama which is sought to be reviewed was rendered on June 24, 1988. This Court has jurisdiction under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution,

Amendment V (in pertinent part)

...; nor shall [any person] be deprived of live, liberty or property without due process of law;...

United States Constitution

Amendment XIV (in pertinent part)

...; nor shall any state deprive any person of life, liberty, or property, without due process of law;...

STATEMENT OF THE CASE

A. STATEMENT OF THE FACTS

The Defendant, James Lewis Smith, was charged with rape, sodomy, and burglary in the first degree. On January 6, 1986, the Defendant entered a plea agreement in which he agreed to plead guilty to burglary I and rape I in exchange for the State's dismissing the sodomy I charge. (S.R. 3-4) The trial court dismissed the sodomy I charge upon the State's motion and accepted the Defendant's plea, sentencing him to concurrent sentences of 30 years. (S.R. 20-28)

Subsequently, the Defendant moved to withdraw his guilty plea. The motion was denied by the trial court. The case was then appealed to the Alabama Court of Criminal Appeals, which held that the trial court erred in accepting the Defendant's plea since he was not apprised that he was to be sentenced under the Alabama recidivist statute.

Smith v. State, 494 So. 2d 182 (Ala. Cr. App. 1986).

After it was remanded, the case was assigned to the trial judge who accepted the Defendant's plea. The sodomy I charge was reinstated. (T.R. 426) On August 18, 1986, the Defendant was tried and convicted on all three charges.

On August 22, 1986, the Defendant appeared before the Court for sentencing. Because of the details of the offense the trial court learned at trial, the court, under its interpretation of North Carolina v. Pearce, 395 U.S. 711 (1969), enhanced the Defendant's sentence, sentencing him to concurrent life sentences for burglary I and sodomy I and 150 years for rape I. (TR. 401-403, Appendix B)

B. PROCEEDINGS BELOW

The Defendant was indicted by the Grand Jury of Montgomery County, Alabama for sodomy in the first degree, rape in the first degree, and burglary in the

first degree in violation of Code of Alabama (1975), §§13A-6-63, 13A-6-61 and 13A-7-5, respectively. (T.R. 416-422) The Defendant initially pled guilty to rape I and burglary I in exchange for the State's dismissing the sodomy I charge. (S.R. 3-4) He was then sentenced to concurrent sentences of 30 years. (S.R. 20-24) He appealed, and the Court of Criminal Appeals permitted the Defendant to withdraw his plea. The Defendant was then tried on all three charges and was sentenced to concurrent life sentences for burglary I and sodomy I and 150 years for rape I. (T.R. 401-403, Appendix B)

The Alabama Court of Criminal Appeals affirmed the Defendant's conviction and sentence with the exception of the 150 year sentence for rape I. Certiorari was granted by the Alabama Supreme Court solely upon the

appropriety of the trial court's enhancement of the burglary I sentence. The court held that the enhancement constituted judicial vindictiveness under its interpretation of North Carolina v. Pearce and remanded the case to the trial court for resentencing. (Appendix A)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT AMONG THE LOWER STATE AND FEDERAL COURTS ON THE QUESTION OF WHETHER NORTH CAROLINA V. PEARCE, 395 U.S. 711 (1969) APPLIES WHERE A DEFENDANT'S GUILTY PLEA IS WITHDRAWN AND AFTER A TRIAL, HE RECEIVES A GREATER SENTENCE THAN HE WOULD HAVE UNDER THE WITHDRAWN PLEA BARGAIN?

In North Carolina v. Pearce, 395 U.S. 711 (1969), a defendant's sentence was enhanced by the trial court following a successful appeal. This

Court held that such enhancement is unconstitutional since it penalizes convicted felons who elect to exercise their appellate remedies; due process requires that vindictiveness against a defendant who has successfully challenged his conviction must play no role in sentencing since the fear of vindictiveness would deter others from exercising their constitutional rights. A sentence can only be enhanced where events subsequent to the first trial have thrown new light upon the defendant's character. Id. at 723-725.

In Bordenkircher v. Hayes, 434 U.S. 357 (1978) this Court refused to broaden the scope of Pearce to include instances where a defendant has repudiated a plea bargain agreement. In Bordenkircher, the defendant and the prosecutor entered into plea negotiations wherein the prosecutor offered a five year sentence for a plea

but informed the defendant that if he insisted on a trial, he would be charged as a habitual offender. Despite the warning, the defendant insisted on trial, and he was charged and convicted as a habitual offender and sentenced to life imprisonment. This Court found Pearce to be distinguishable from these facts. In Pearce, the State unilaterally imposed a penalty upon a defendant who had chosen to exercise his right to appeal his original conviction which this Court found to be a situation "very different from the give-and-take negotiations common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." Id. at 362.

This Court has yet to address the analogous situation where the trial court has enhanced a defendant's sentence after a trial following the

defendant's repudiation of a plea bargain. However, other jurisdictions have faced this issue and have treated it dissimilarly.

In the instant case, the Alabama Supreme Court held that a trial court is precluded from enhancing a defendant's sentence except in the limited circumstances as prescribed by Pearce, irrespective that the defendant rejected the plea bargained sentence and insisted on trial. Some jurisdictions have treated this issue similarly. United States v. Gilliss, 645 F. 2d 1269 (3rd Cir. 1981); State v. Sutton, 197 Conn. 485, 498 A. 2d 65 (Conn. 1985); Castleberry v. Texas, 704 F. 2d 21 (Tex. Cr. App. 1984); Palm v. State, 656 F. 2d 429 (Tex. Cr. App. 1981).

However, other jurisdictions have excluded the principles of Pearce to the consequences of plea bargaining, holding

that a claim of judicial vindictiveness will not be heard when the sentence given by the trial court is harsher than the sentence offerred in the plea bargain but rejected by the defendant. Hitchcock v. Wainwright, 745 F. 2d 1332 (11th Cir. 1984); Lippert v. Blackburn, 740 F. 2d 457 (6th Cir. 1984); Ehl v. Estelle, 656 F. 2d 166 (5th Cir. Unit A 1981); Frank v. Blackburn, 646 F. 2d 873 (5th Cir. 1980); State v. Bawdon, 386 N.W. 2d 484 (S.D. 1986); Frazier v. State, 467 So. 2d 447 (Fla. App. 3 Dist. 1985); People v. Miller, 477 N.Y. S. 2d 688 (N.Y. App. Div. 1984). The logic behind these holdings is apparent. "If a defendant can successfully demand the same leniency after standing trial that was offered to him prior to trial in exchange for a guilty plea, all incentives to plea bargain disappear; the defendant has nothing to lose by

going to trial." Frank, 646 F. 2d at 883. All decisions to the contrary, including the case at bar, undermine the underlying philosopy and purpose of the plea bargaining system.

Because of the split among the lower courts and the effect these decisions have upon the plea bargaining system, this Court should grant certiorari to decide whether under the Fifth and Fourteenth Amendments a trial court may enhance a defendant's sentence following his repudiation of a plea bargain agreement.

II. THIS COURT SHOULD GRANT CERTIORARI AND OVERRULE THE OPINION OF THE ALABAMA SUPREME COURT WHICH MISAPPLIED FEDERAL CONSTITUTIONAL LAW BY PRESUMING JUDICIAL VINDICTIVENESS MERELY BECAUSE THE DEFENDANT RECEIVED A GREATER SENTENCE AFTER TRIAL THAN HE WOULD HAVE HAD HE PLEADED GUILTY.

If this Court finds that the Pearce analysis is applicable, the opinion of the Alabama Supreme Court is still in conflict with opinions of this Court and lower federal courts. The Alabama Supreme Court presumed judicial vindictiveness merely because the Defendant's burglary I sentence was enhanced; such a presumption is erroneous. Due process does not preclude a trial judge from enhancing a defendant's sentence upon retrial after appeal but only by those "that pose a realistic likelihood of

vindictiveness." Blackledge v. Perry, 417 U.S. 21 (1974). In the case at bar, this test is not met. Indeed, the trial court specifically stated that it was not enhancing the sentence vindictively but because it had learned from the details exposed at trial the real flavor of the offense. (T.R. 401-403, Appendix B) This reason has been found to be sufficient by a lower federal court. Frank, 646 F. 2d at 885.

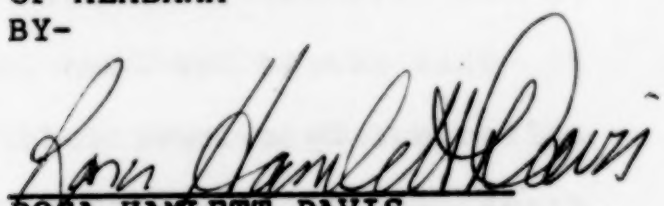
This Court should grant certiorari to correct the Alabama Supreme Court's misapplication of the Pearce analysis.

CONCLUSION

For the reasons stated, this Court should grant certiorari to decide the important federal questions presented in this case.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
OF ALABAMA
BY-



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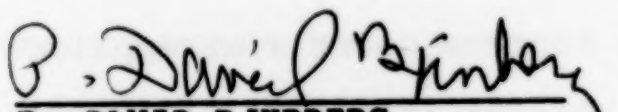

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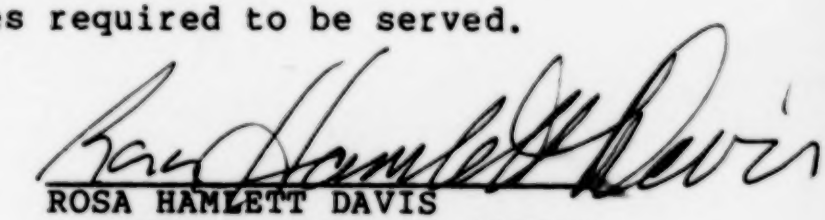
CERTIFICATE OF SERVICE

We, Rosa Hamlett Davis and P. David Bjurberg, the members of the Bar of the Supreme Court of the United States, do hereby certify that this 23rd day of August, 1988, we did serve a copy of this petition and a copy of the accompanying appendix on Respondent by placing the same in the United States Mail, first class postage prepaid, and properly addressed to counsel of record for Respondent as follows:

Hon. John C. Cason
Attorney at Law
503 South Court Street
Suite 320
Montgomery, Alabama 36104

We further certify we have served all parties required to be served.



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88-393

Supreme Court, U.S.
FILED
AUG 24 1988
JOSEPH F. SPANIOL, JR.

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF ALABAMA,

PETITIONER,

VS.

JAMES LEWIS SMITH,

RESPONDENT.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

OF

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APPENDIX A

THE STATE OF ALABAMA
JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1987-88

Ex parte James Lewis Smith

86-1488 PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: James Lewis Smith
v.
State of Alabama)

JONES, JUSTICE.

The petitioner was arrested and indicted on charges of rape, burglary, and sodomy, all arising out of the same alleged incident. As a result of a plea bargain agreement, the sodomy charge was nol-prossed and the petitioner pleaded guilty to the charges of first degree rape and first degree burglary. After a sentencing hearing, the petitioner was sentenced to 30 years on each conviction, the sentences to run concurrently.

Subsequently, the petitioner filed a motion seeking to withdraw his guilty pleas, claiming that he did not enter the guilty please knowingly or voluntarily. The trial court denied this motion. The Court of Criminal Appeals, however, found that the petitioner had not been properly informed of the potential sentences before pleading guilty, reversed the conviction and sentences, and remanded the cause to the trial court. Smith v. State, 494 So. 2d 182 (Ala. Cr. App. 1986).

The State than moved to reinstate the charge of first degree sodomy. On remand, the case was reassigned to the same trial judge, and he granted the State's motion to reinstate the original indictment. After a hearing on a number of defense motions, trial was conducted on the merits of the case. The jury

returned a verdict of guilty on all three counts. After a sentencing hearing, the petitioner was sentenced to life imprisonment for the conviction of first degree sodomy, which term was to run concurrently with a life term for the first degree burglary conviction. The petitioner was also sentenced to a term of 150 years for the conviction of first degree rape, that sentence to run consecutively to the other two sentences. The Court of Criminal Appeals affirmed the conviction, affirmed the life sentences for the sodomy and burglary convictions, and remanded to the trial court for resentencing on the rape conviction.

We granted the defendant's request for review of the Court of Criminal Appeals' judgment affirming the judgment of the sentence that enhanced the petitioner's sentence for burglary

from 30 years to life imprisonment. The 150-year sentence for rape and the life sentence for sodomy are not before us for review. We reverse and remand as to the enhanced sentence for burglary.

In the resentencing of the petitioner after remand and conviction, the trial court stated:

> "The court finds that since I did not hear all the testimony during your plea and now at trial have heard all the testimony . . . , the court finds that it's proper to increase the [burglary] sentence beyond that which was given you on the plea bargain."

It is clear that the trial judge increased the petitioner's sentence because of his subjective observations and not because of any objective evidence of events subsequent to the petitioner's first conviction. We adopt the language from Rice v. Simpson, 274 F. Supp. 116 (M. D. Ala. 1967), affirmed, 396 F. 2d 499 (5th Cir. 1968),

affirmed sub nom North Carolina v. Pearce, 395 U.S. 711 (1969), as the applicable rule in Alabama:

> "[T]here can be no increase in a sentence in a criminal case after the sentence is imposed. . . . To deny such protection to conviction criminals who elect to exercise their post-conviction remedies and do so successfully is unfair discrimination and does nothing except to serve to limit the use of post-conviction proceedings in the Alabama state courts by prisoners. It denied the prisoner the protection of his original sentence as a condition to the right of his appealing his conviction or exercising his post-conviction remedies."

274 F. Supp. at 122. See, also, Ex parte Tice, 475 So. 2d 590 (Ala. 1984).

In support of the affirmance of the petitioner's enhanced sentence in the burglary conviction, the State quotes the following language from North Carolina v. Pearce, 395 U.S. 711 (1969):

"A trial judge is not constitutionally precluded . . . from imposing a new sentence whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' Williams v. New York, 337 U.S. 241, 245. Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new pre-sentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in Williams v. New York, supra, that a state may adopt the prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. Id., at 247."

395 U.S. at 723.

The State's reliance on Pearce is misplaced. Indeed, in unmistakable

terms, the holding in Pearce makes it abundantly clear that the authorization for an enhanced resentencing "in the light of events subsequent to the first trial" is an exception to the general rule that, absent such evidence, a sentence imposed at the first trial may not be enhanced upon reconviction at the second trial after the first conviction has been overturned on appeal and remanded for a new trial.

REVERSED AND REMANDED.

Torbert, C.J., and Almon, Shores, Houston, and Steagall, JJ., concur.

Maddox, Beaty, and Adams, JJ., dissent.

Ex parte James Lewis Smith

MADDOX, JUSTICE (Dissenting.)

I do not believe that the trial court erred in enhancing the petitioner's sentence. In some respects, this case is similar to Wesley v. State, 481 So. 2d 1155 (Ala. Cr. App. 1985), reversed and remanded 481 So. 2d 1162 (Ala. 1985), on remand, 481 So. 2d 1163 (Ala. Cr. App. 1985). In that case, Wesley was indicted for robbery in the first degree, and that indictment was amended to charge attempted robbery. He pleaded guilty to that charge, but his plea was set aside on appeal because the general attempt statute was no longer applicable to robbery offenses. Wesley v. State, 448 So. 2d 468 (Ala. Cr. App. 1984). Wesley was retried on the same indictment, but for robbery in the first degree, and the

Court of Criminal Appeals affirmed his conviction on that charge. This Court reversed that decision of the Court of Criminal Appeals saying: "It follows that when the State of Alabama chose to try petitioner again on the void amended indictment, his conviction was erroneous. However, as stated in Wesley, supra, the State of Alabama is free to reindict petitioner for the appropriate offense. Williams v. State, 333 So. 2d 613 (Ala. 1976)." Ex parte Wesley, 481 So. 2d 1162, 1163 (Ala. 1985). (emphasis added). Implicit in this holding is the idea that Wesley could receive a higher sentence than was imposed when he pleaded guilty, because he could be tried for robbery I.

Furthermore, change and sentence concessions can be made when an accused voluntarily enters a plea of guilty and the principles of North Carolina v. Pearce, 395 U.S. 711 (1969), would not

apply. Instead, the principles of Brady v. United States, 397 U.S. 742 (1970), would apply. The Supreme Court of the United States held in Brady that sentence concessions may be made constitutionally when persons plead guilty. The Court held:

> "Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charges if a conviction is obtained after the State is put to its proof.
>
> "... We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

consideration for the victims of his or her criminal activity, by desiring either to make restitution or to prevent unseemly public scrutiny or embarrassment to them; or

"(iv) the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct.

"(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere."

In this case, petitioner successfully attacked his guilty plea on the basis that the maximum possible sentence was not explained to him; his plea was not, therefore, knowingly and intelligently given.

It would appear to me that a petitioner should not be allowed to receive sentence concessions in return for a guilty plea and then, after a successful attack on that plea, bind the State to its original sentencing bargain if he is later convicted after a trial. Thus, a petitioner could go to trial and chance an acquittal knowing he could receive a sentence no harsher than he was originally given.

The facts of this case are dissimilar to North Carolina v. Pearce, in my opinion, and I would affirm the judgment of the Court of Criminal Appeals; consequently, I must respectfully dissent.

Adams, J., concurs.

ON APPLICATION FOR REHEARING

JONES, JUSTICE.

APPLICATION FOR REHEARING OVERRULED.

Almon, Shores, Houston, and Steagall, JJ., concur.

Torbert, C. J., and Maddox, Beatty, and Adams, JJ., dissent.

MADDOX, Justice (Dissenting from denial of rehearing).

The majority denies the State's application for rehearing without comment, apparently on the ground that the State has presented nothing new for the Court to review. I believe the State has shown in its brief why the case of North Carolina v. Pearce, 395 U.S. 711 (1969), is not applicable here.

Because the majority fails to distinguish cases cited in the State's brief that indicate to me that we should grant rehearing in this case, I take this opportunity to extend the dissent which I filed on original deliverance. In my opinion, the Supreme Court of the United States has refused to broaden the scope of Pearce, especially in fact situations such as that presented here.

In Bordenkircher v. Hayes, 434 U.S. 357 (1978), the defendant, with counsel, and the prosecutor, entered into plea negotiations whereby the prosecutor offered to recommend a five-year sentence if the defendant would plead guilty as charged to uttering a forged instrument. The prosecutor told the defendant that if he did not plead and save the court the inconvenience and necessity of a trial, he would return to the grand jury and

seek an indictment under the habitual offender law, subjecting the defendant to a mandatory sentence of life imprisonment. The defendant rejected the offer, and the prosecutor obtained an indictment charging him under the habitual offender law. The defendant was subsequently tried and convicted and sentenced to life imprisonment. The defendant then challenged the prosecutor's actions, claiming it was an impairment of his constitutional rights to a trial. Id. at 359. The Supreme Court found Pearce to be distinguishable. In Pearce, the State unilaterally imposed a penalty upon a defendant who had chosen to exercise his right to appeal his original conviction. The Court found this was a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and

defense, which arguably possess relatively equal bargaining power." Id. at 362. The Court further stated:

> "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' . . . But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.
>
> Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial."

Id. at 363 (citations omitted). The Court found the prosecutor's action to be constitutional, stating that a "rigid constitutional rule" prohibiting a prosecutor from acting forthrightly in his dealings with the defense "could

only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." Id. at 365.

Although Bordenkircher dealt with prosecutorial vindictiveness rather than judicial vindictiveness, its reasoning is persuasive in the instant case. Here, as in Bordenkircher, the petitioner was given the option of either accepting the plea bargain or insisting upon trial. Further, just as the defendant in Bordenkircher was aware of the consequences of rejecting the prosecutor's offer of a plea bargain, the petitioner in this case was aware of the consequences of setting aside the plea bargain. The supplemental transcript indicates that the petitioner was aware that the sodomy charge was nol-prossed only because of his guilty

plea. Additionally, he was aware that the maximum sentence he could receive a burglary I was life imprisonment and that that was the maximum sentence for rape I as well. As is the custom where a court sentences an accused following a guilty plea, the court in this case displayed leniency in sentencing the petitioner to concurrent sentences of 30 years for burglary I and rape I. However, petitioner chose to forgo this leniency, and by appealing his conviction, withdrew his plea, thus tacitly repudiating his plea bargain agreement. See Moore v. Foti, 546 F. 2d 67 (5th Cir. 1977). Thus, petitioner chose to subject himself to the possibility of receiving life sentences for rape I and burglary I if convicted and having reinstated the sodomy I charge with its maximum sentence of life imprisonment.

the State reinstituted the first degree murder charge. In his federal habeas corpus petition, the defendant asserted that this action placed him in double jeopardy. The Fifth Circuit rejected this argument and stated that the defendant's successful challenge to his plea bargained sentence was a "tacit repudiation of the bargain, allowing the government to prosecute him on the greater charge." 546 F.2d at 68.

Although Foti dealt with double jeopardy issues, its reasoning is useful in the instant case. Like the defendant in Foti, the petitioner in this case successfully challenged his plea bargained conviction and sentence because he was obviously unsatisfied with the sentence initially imposed. Foti held that in such an instance, the defendant's action is a "tacit repudiation" of the plea bargain

agreement and he must face the consequences of his decision.

Like the defendant in Foti, the petitioner in this case repudiated the plea agreement. By this action, he not only permitted the State to reinstitute the sodomy I charge, but also permitted the trial court to enhance his sentence, because the sentence initially imposed was at least partly the result of leniency shown because he did not inconvenience the court and cause embarrassment to the victim when he chose to plead guilty to the charges rather than to stand trial.

In Frank v. Blackburn, 646 F. 2d 873 (5th Cir. 1980), the analysis of Bordenkircher was applied to the issue of judicial vindictiveness. In Frank, the defendant attacked his sentence on the ground that the trial judge impermissibly increased his sentence

because he rejected a plea bargain offer and elected to stand trial. The trial court offered a 20-year sentence if the defendant would plead guilty to the charge, but the defendant opted to stand trial. Upon conviction, he was sentenced to 33 years. The federal district court denied habeas corpus relief, but a three-judge panel of the Fifth Circuit reversed, finding that the defendant was penalized by the state court because he exercised his right to stand trial. The court later decided to rehear the case en banc "because of its potentially devastating impact upon the plea bargaining process." 646 F. 2d at 875. A majority of the en banc court found that no constitutional rights were violated in the conviction and sentencing of the defendant.

In reaching its decision, the court noted the advantages of the plea

bargaining process, which it found to expedite justice and to conserve judicial resources. 646 F. 2d at 878. The court agreed with the defendant's assertion that a person cannot be punished simply for exercising his constitutional right to stand trial, but the court did not agree that the mere imposition of a longer sentence than defendant would have received had he pleaded guilty automatically constitutes such punishment. Id. at 883. A defendant is free to accept or reject the offer of the State. Once it is rejected, however, the defendant cannot complain that the denial of the benefits of the offer he rejected constitutes punishment or evidences judicial vindictiveness. "To accept such an argument is to ignore completely the underlying philosophy and purpose of the plea bargaining system. If a defendant

can successfully demand the same leniency after standing trial that was offered to him prior to trial in exchange for a guilty plea, all the incentives to plea bargain disappear; the defendant has nothing to lose by going to trial." Id. at 883.

APPENDIX B

THE COURT: You had a trial and were convicted of rape, burglary and sodomy in the first degree. When you entered your plea, you told me your side of the story. And of course, now that the court has had a trial and heard all of the evidence -- and the court by no means would increase your punishment beyond thirty years for rape and burglary on the fact that you were successful on your appeal because this court doesn't get into punishing or attempting to punish people for exercising all of their constitutional rights which is to appeal from a

conviction or plea, or to have a trial if you so desire. There is nothing this court does which should be viewed as punishment for a successful appeal. I hope we all understand that. But under North Carolina versus Pearce, 395, U.S. 711; 23, L. ED., 2D, 656; 89 S. CT., 2072, the court finds that since I did not hear all of the testimony during your plea and now at trial have heard all of the testimony which consisted of raping the victim at least five times, and after the second or third time, then causing her to perform oral sex on you, and then of course, your performing oral sex on

her, and then of course, at least raping her one or two more times after that, threatening her life with the knife and all, after looking at this matter, and your mental outlook on it and your position during the trial and what you said, the court finds that it's proper to increase the sentence beyond that which was given to you on the plea bargain.

Okay. In addition to that, the habitual offender act has been imposed. And taking everything into consideration from the events of the crime, in the case of 85-1684, burglary in the first degree, do you have anything to say now

after the court has explained to you its position on after hearing all of the evidence that was presented during the trial? Do you have anything to say before I sentence you?

THE DEFENDANT: No, sir.

THE COURT: In case number 85-1684, burglary in the first degree, the court hereby sentences you to life in the penitentiary.

JAN 6 P5:51
RESPONSE REQUESTED

ORIGINAL

Supreme Court, U.S.
FILED
NOV 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 88-333

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF ALABAMA

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Respondent, James Lewis Smith, hereby moves the Court to allow him to proceed in forma pauperis. His attorney's affidavit in support of this motion is attached as Exhibit A.

Submitted by,

JOHN C. CASON
Hooper & Cason
456 South Court Street
Montgomery, Alabama
(205) 834-3200

CERTIFICATE OF SERVICE

I, the undersigned attorney, do hereby certify that prior to filing the foregoing or immediately thereafter, I caused to be delivered a true and correct copy of same, United States postage prepaid, and correctly addressed to Don Siegelman, Attorney General, and Paul David Bjresberg, Assistant Attorney General of the State of Alabama.

Done this the 22 day of November, 1988.

ATTORNEY FOR RESPONDENT

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EXHIBIT A

NO. 88-333

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF ALABAMA,

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

AFFIDAVIT OF ACCOMPANY MOTION
FOR LEAVE TO PROCEED IN FORMA PAUPERIS

I, John C. Cason, Attorney for James Lewis Smith, being first duly sworn, depose and say that I am the Respondent in the above-entitled case; that in support of my motion to proceed without being required to prepay fees or costs therefor, I state that because of his financial condition he is unable to pay the costs of said proceeding.

I further swear that the responses which I have made to the questions and instructions below, relating to his ability to pay the cost of prosecuting the appeal, are true and are personally known to me.

1. Are you presently employed? No, incarcerated at 110 Warrior Lane, Bessemer, Alabama 35023, for a term of 30 years in the State penitentiary.

A. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. Approximate 1986 as a Janitor at minimum wage.

2. Have you received within the past twelve months any income from a business, profession, or other form of

self-employment, or in the form of rent payments, interest, dividends, or other source? No.

3. Do you own any cash, checking or savings accounts? No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for perjury.

JOHN C. CASON
Attorney for James Lewis Smith

SUBSCRIBED AND SWORN TO before me this the 22 day of _____, 1988.

NOTARY PUBLIC

MY COMMISSION EXPIRES: 5/20/91

NO. 88-333

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF ALABAMA,

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION

JOHN C. CASON
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Montgomery, AL 36104
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COUNSEL FOR RESPONDENT

NO. 88-333

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1988

STATE OF ALABAMA,

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, James Lewis Smith, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the Alabama Supreme Court's opinion in this case. That opinion is reported in Petitioner's Appendix as Appendix A.

QUESTION PRESENTED

1. Should this Court grant certiorari when this Court's opinion, North Carolina vs. Pearce, 395 U.S. 711 (1969), is not in conflict with the decision of the Alabama Supreme Court in this case and where, under the analysis required by Rice vs. Simpson, 274 F. Supp. 116 (M.D. Ala. 1967), Aff'd, 396 F.2d 499 (5th Cir. 1968), affirmed sub nom. North Carolina vs. Pearce, 395 U.S. 711 (1969), as the applicable rule in Alabama applied in this case?

PARTIES

Respondent adopts the Petitioner's statement with respect to the parties.

STATEMENT

Petitioner's statement of the case is incomplete, and like the entire Petition, misleading. This statement of the case is not intended to summarize completely the proceedings below, but rather to point out the most significant misstatements and omissions of the Petitioner.

The Court of Criminal Appeals determine that the Respondent, James Lewis Smith, had not been properly informed of the potential sentences before pleading guilty, reversed the conviction and sentences, and remanded the case to the trial court. Smith vs. State, 494 So.2d 182 (Ala. Crim. App. 1986). The defendant was then tried on all three charges and was sentenced to concurrent life sentences for Burglary I and Sodomy I and 150 years for Rape I to run consecutively (J.R. 401-403, Appendix B).

REASONS FOR DENYING THE PETITION

I. The Alabama Supreme Court Decision is not a departure from existing principles setting guidelines for sentence enhancement under North Carolina vs. Pearce, 395 U.S. 711 (1969), or the greater standard set for sentence enhancement in Alabama under Ex Parte Tyce, 475 So.2d 590 (Ala. 1984).

Under North Carolina vs. Pearce, 395 U.S. 711 (1969), a sentence may be increased "in the light of events subsequent to the first trial" if the circumstances so warrant said

enchancement. This is an exception to the general rule in Alabama which prohibits any increase in sentence in a criminal case after a sentence has been imposed, including the imposition of a harsher sentence upon a reconviction of a defendant who successfully exercises his appeal rights, overturns the first conviction, and gains a new trial. Ex Parte Tyce, 475 So.2d 590 (Ala. 1984).

The defendant in this case orginally plead guilty to all three charges and was sentenced to 30 years concurrent on each count. Subsequently, said conviction was overturned by the Alabama Court of Criminal Appeals and remanded for a new trial. Smith vs. State, 494 So.2d 182 (Ala. Crim. App. 1986).

Upon reconviction the defendant's sentence was enhanced as stated, which is in clear violation of the principles enumerated in Ex Parte Tyce, 475 So.2d 590 (Ala. 1984).

It is abundantly clear that the standards of sentence enhancement in Alabama exceed those required in North Carolina vs. Pearce, 395 U.S. 711 (1969).

Further in support of the greater standard set in Alabama for sentence enhancement the language from Rice vs. Simpson, 272 F. Supp. 116 (M.D. Ala. 1967), aff'd, 396 F.2d 499 (5th Cir. 1968),. aff'd sub nom. North Carolina vs. Pearce, 395 U.S. 711 (1969), has been declared by the Alabama Supreme Court in this particular case as the applicable rule in Alabama.

Conclusively, there is no conflict in the Alabama Supreme Court decision in this case as it sets a greater standard for sentence enhancement rather than being in conflict with the standards required by the language from North Carolina vs. Pearce, 395 U.S. 711 (1969):

II. This Court should deny certiorari based upon the State's allegation that the Alabama Supreme Court presumed judicial vindictiveness and misapplied Federal Constitutional Law.

The appellants argue the Alabama Supreme Court misapplied Federal Constitutional Law by presuming judicial vindictiveness; however, there is nothing in the opinion of the Alabama Supreme Court in this case that implied or expressly hints that the Alabama Supreme Court presumed such a thing.

This argument is groundless and is founded upon erroneous presumption not in the record.

III. This Court should deny certiorari in said case for the defendant has been resentenced by the lower Trial Court thus rendering said case mute.

On the 1st day of July, 1988, the State of Alabama filed a Motion to Stay Pending Appeal to the United States Supreme Court (See Exh. 1). On the 18th day of July, 1988, the Supreme Court of Alabama denied said request (See Exh. 2). On the 13th day of September 1988, the lower Court resentenced the defendant for thirty (30) years in the penitentiary, all cases to run concurrent (See Exh. 3).

Thus, the issue of the defendant's sentence enhancement is a mute issue since he has now received his new sentence which can not be appealed after 42 days from the date of sentence under Alabama Rules of Appellate Procedure, Rule 4(a)(1).

CONCLUSION

The issue of whether or not a sentence can be enhanced are clearly defined in North Carolina vs. Pearce, 395 U.S. 711 (1969). Further, the greater standard of sentence enhancement in Alabama has been clearly established in Ex Parte Tyce, 475 So.2d 590 (Ala. 1984).

Thus your Respondent would contend there is no actual controversy before this Court and thus the Petition for Writ of Certiorari should be denied.

Submitted by:

JOHN C. CASON
Attorney for Respondent

OF COUNSEL:

Hooper & Cason
456 South Court Street
Montgomery, Alabama 36104
(205) 834-3200

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon Don Siegelman, Attorney General, State of Alabama, and David Bjurberg, Assistant Attorney General of Alabama by placing copy of same in the U. S. Mail, postage prepaid this the 22 day of November, 1988.

OF COUNSEL

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA, *
Plaintiff *
CASE NO. CC-85-1682-84
vs. *
JAMES LEWIS SMITH, *

ORDER

Pursuant to the opinion of the Supreme Court of Alabama, October Term, 1987-88, in reference to the Petition for Writ of Certiorari to the Court of Criminal Appeals, Case No. 86-1448, the Court hereby resentences the above-named defendant to thirty (30) years in the penitentiary on Case Nos. 85-1683 and 1684 to run concurrent with each other and Case No. 85-1682.

DONE this 13th day of September, 1988.

CHARLES PRICE, Circuit Judge

cc: John Cason
David Belser

S. C. NO. 86-1448

IN THE SUPREME COURT OF ALABAMA

EX PARTE: JAMES LEWIS SMITH,

IN RE: JAMES LEWIS SMITH,

APPELLANT-PETITIONER

VS.

STATE OF ALABAMA,

APPELLEE-RESPONDENT

MOTION TO STAY PENDING APPEAL
TO THE UNITED STATES SUPREME COURT

Comes now the Appellee in the above-styled cause and respectfully request this Court that it stay any further action on this matter until it can be adjudicated by the United States Supreme Court. A petition for writ of certiorari will be filed with the United States Supreme Court by August 23, 1988.

Respectfully submitted,

DON SIEGELMAN
ATTORNEY GENERAL
BY-

J. RANDALL McNEILL
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I hereby certify that I have this 1st day of July, 1988, served a copy of the foregoing on the attorney for the Appellant, Hon. John C. Cason, Attorney at Law, 503 South Court Street, Suite 320, Montgomery, AL 36104, by placing same in the United States Mail, postage prepaid.

J. RANDALL McNEILL
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

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11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

0007h

THE STATE OF ALABAMA - - - - - - - - - - JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

July 18, 1988

86-1448

Ex Parte James Lewis Smith

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(In re: James Lewis Smith v. State)

ORDER

The Attorney General of the State of Alabama having filed a motion to stay further proceedings in this case pending an appeal to the United States Supreme Court, and the same having been submitted and duly considered by the Court,

IT IS ORDERED that the motion to stay further proceedings is denied.

I, Robert G. Esdale, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 18th day of July, 1988.

Robert G. Esdale

Clerk, Supreme Court of Alabama

No. 88-333 (3)

FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

STATE OF ALABAMA,

Petitioner,

v.

JAMES LEWIS SMITH,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Alabama

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 23, 1988
CERTIORARI GRANTED JANUARY 9, 1989

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
	CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
11/16/85	Respondent Indicted for Burglary, Rape and Sodomy.
1/6/86	Respondent's Guilty Plea Proceeding.
1/17/86	Sentencing Hearing wherein Respondent sentenced to thirty years on Burglary and Rape convictions.
3/17/86	Motion to Withdraw Guilty Plea.
3/17/86	Court's Denial of Motion to Withdraw Guilty Plea.
	ALABAMA COURT OF CRIMINAL APPEALS
7/15/86	Court's Opinion reversing trial court's refusal to allow withdrawal of guilty plea [Reported as *Smith v. State*, 494 So.2d 182 (Ala.Cr.App. 1986)].
	CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA
8/4/86	Motion to Recuse Trial Judge.
8/12/86	Supplemental Motion to Recuse.
8/13/86	Hearing on Motion to Recuse and Denial.
8/22/86	Motion for new trial and denial of motion.
8/22/86	Sentencing hearing following jury verdict wherein Respondent's sentence to Life terms for burglary and sodomy and 150 years for rape.

Date	Proceedings
	ALABAMA COURT OF CRIMINAL APPEALS
5/26/87	Opinion affirming conviction and burglary and sodomy sentences.
	ALABAMA SUPREME COURT
4/8/88	Alabama Supreme Court opinion reversing burglary sentence but affirming conviction.
6/24/88	Denial of Petitioner's rehearing.
	ALABAMA COURT OF CRIMINAL APPEALS
1/27/89	Order on Remand from Alabama Supreme Court.
1/31/89	Order Staying Remand Pending Outcome in this Court.

Original Guilty Plea Proceedings
[Supplemental Record on Appeal]

(p. R-2) IN THE FIFTEENTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA

State of Alabama Plaintiff,	)	CC-85-1683-PR
vs.	)	CC-85-1684-PR
James L. Smith, Defendant.	)	

* * * *

Whereupon, the following guilty plea occurred on January 6, 1986, and sentencing occurred on January 17, 1986, before the Honorable Judge Charles Price.

* * * *

APPEARANCES

For the Plaintiff
State of Alabama:

Hon. Randy James
Deputy District Attorney
15th Judicial Circuit
District Attorney's Office
Montgomery County Courthouse
Montgomery, Alabama

For the Defendant
James L. Smith:

Hon. Elno A. Smith, Jr.
Smith, Cruse & Law
201 Washington Court Building
25 Washington Avenue
Montgomery, Alabama

(p. R-3) (Whereupon, the following proceedings occurred it approximately 8:45 a.m. on January 6, 1986.[)]

THE COURT: Mr. James L. Smith. In 85-1683, you're charged with rape in the first degree.

MR. SMITH: All right.

THE COURT: In 85-1684, you're charged with sodomy in the first degree.

MR. SMITH: They are going to dismiss the sodomy.

THE COURT: Does he understand what he is charged with?

MR. SMITH: Yes, sir.

THE COURT: Is that your mother back there?

THE DEFENDANT: My friend.

THE COURT: She can come take a seat out here because I want her to listen to what you say. All right. Pull a chair up around here and feel comfortable.

Mr. Smith, I understand you are here – is there a motion on either case?

MR. JAMES: The State moves to nolle pross case 85-1682, the sodomy in (p. R-4) the first degree, in exchange for pleas.

THE COURT: Is the victim here? You want to bring her in?

MR. JAMES: No, sir.

THE COURT: Case 85-1682, sodomy in the first degree, the State's motion to nolle pross is hereby granted.

Now, Mr. Smith, I understand you want to change your plea from not guilty to guilty in case 85-1683 which is rape in the first degree, and also in case 85-1684 which is burglary in the first degree, is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: You have to speak up. You are the one doing this because she has to take it down what you say.

How old are you?

THE DEFENDANT: Twenty-six.

THE COURT: How far did you go in school?

THE DEFENDANT: I received a G.E.D. which is equivalent to a high school education.

THE COURT: You read and write and understand the English language?

THE DEFENDANT: Basically.

(p. R-5) THE COURT: Do you have any limitations on that?

THE DEFENDANT: I have complications in certain things, in comprehending.

THE COURT: Such as what?

THE DEFENDANT: I can read pretty good and so forth, but you know, I have limitations.

THE COURT: We all have limitations. There are a lot of things I don't understand. I don't understand computer language. But you can read and write and understand English, can't you?

THE DEFENDANT: (Nods head to indicate the affirmative.)

THE COURT: You are not under the care of a psychiatrist, are you?

THE DEFENDANT: Not as I know of.

THE COURT: Well, you know whether you are under any psychiatric care or not.

THE DEFENDANT: No, sir.

THE COURT: Not that you know of. Are you receiving any psychiatric help?

THE DEFENDANT: No, sir.

THE COURT: Okay. Now, have you had any alcohol or any drugs within (p. R-6) the last twenty-four hours that render you incapable of having full control of your mental faculties this morning?

THE DEFENDANT: (Nods head to indicate the negative.)

THE COURT: Do you know what you're charged with?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand you don't have to plead in either one of these cases? You have the right to a trial by jury in each one of these cases, and if the Court finds that these two cases arise out of the same factual situation, I can consolidate the cases for trial and you'll have one trial at one time for these cases. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if you have a jury trial, that means a certain number of citizens from Montgomery County would be summoned for jury duty, and they are already here. They are waiting around in the jury assembly room. I will bring (p. R-7) them around here, and from that number, twelve persons would be selected to sit as a jury in your case. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And you and your lawyer and the prosecutor, and the Court, to a certain extent, will participate in the process of selecting the jury. and the D.A. and your lawyer will select twelve people to try your case.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. Do you understand that[?]

THE DEFENDANT: Yes, sir.

THE COURT: If you waive a jury trial and I accept that waiver, then you have a right to a trial before me without a jury.

THE DEFENDANT: Yes, sir.

THE COURT: Now, in either case, the burden is on the State of Alabama to prove your guilt beyond a reasonable doubt and to have a moral certainty. And if you have a jury trial and the State meets that burden, the jury would be authorized to find you guilty; (p. R-8) so would I, if you have a trial before me alone. On the other hand, if the State fails to meet their burden, then the jury would

be authorized to find you not guilty; so would I, if you have a trial before me without a jury and the State fails to meet their burden.

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that if you have a trial, you have the right to elect whether or not you testify. If you have a jury trial and you elect not to testify, your lawyer, the prosecutor, nor I can comment to the jury about the fact that you elected not to testify. If you have a trial before me alone and elected not to testify, I wouldn't hold that against you.

THE DEFENDANT: Yes, sir.

THE COURT: If the State brings in witnesses to testify against you, you have the right to cross-examine those witnesses through your lawyer. If you have any witnesses you want to testify (p. R-9) on your behalf, you have the right to subpoena those witnesses through the Clerk's Office of the Court without any charge to yourself. Do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that – have you discussed these cases with Mr. Smith?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that any conversations you have had with Mr. Smith are confidential between the two of you, and I wouldn't call upon him to disclose to me or to anyone else anything about your involvement in these cases?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand that you come into Court presumed to be innocent, and that presumption attends you until the State proves your guilt beyond a reasonable doubt and to a moral certainty, to the satisfaction of a jury; to my satisfaction, if you have a trial before me without a jury; or until you convince me you are guilty by what you tell me here this (p. R-10) morning.

THE DEFENDANT: Yes, sir.

THE COURT: I have before me an Exhibit A, and I ask you to look at it.

THE DEFENDANT: (Complies.)

THE COURT: Is that your signature on there?

THE DEFENDANT: Yes, sir.

THE COURT: Did you have an opportunity to go over this form with your lawyer before you signed it?

THE DEFENDANT: Yes, sir.

THE COURT: Do you understand everything on it?

THE DEFENDANT: I believe so.

THE COURT: Well, do you have any questions about it?

THE DEFENDANT: I –

THE COURT: Well, Mr. Smith explained to you what this form was about, didn't he? And this form contains basically what I've told you. You have the right

to – you don't have to plead guilty, you have the right to cross-examine witnesses, you have the right to subpoena any witnesses you want to testify for you, you don't have to take the stand to testify unless you (p. R-11) want to, you will participate in the selecting of the jury. Mr. Smith went over all of that with you, didn't he?

THE DEFENDANT: Yes, sir.

THE COURT: Do you have any questions about it?

THE DEFENDANT: I do have one.

THE COURT: Mr. Smith explained this, did he not?

MR. SMITH: Let me ask what the question is.

THE COURT: What question do you have?

THE DEFENDANT: I don't have any.

THE COURT: What question do you have?

THE DEFENDANT: I don't have any.

THE COURT: Go down and let him point out the question to you since he says he has one.

MR. SMITH: All right. I would be happy to.

(PAUSE.)

MR. SMITH: I answered his question.

THE COURT: What was it?

MR. SMITH: He wanted to know if he pled guilty, would you sentence him today. I told him no, that you would run a pre-sentence report.

(p. R-12) THE COURT: Of course, that wasn't on here.

Do you have any questions about that form?

(Defendant sways.)

THE DEPUTY: What is wrong with you?

THE COURT: Nothing. You have to hold your own.

Do you have any questions about this form?

THE DEFENDANT: No, sir.

(Defendant sways.)

THE COURT: Do you understand if you plead guilty in case number 85-1683, rape in the first degree, that I will be authorized to sentence you to ten years up to life in the penitentiary?

THE DEFENDANT: Yes, sir.

THE COURT: If you plead guilty in 85-1684, burglary in the first degree, I will be authorized to sentence you to ten years up to life in the penitentiary?

THE DEFENDANT: Yes, sir.

THE COURT: If you have any prior felony or felonies, of course, and the State moves the Court to invoke the Habitual Offender Act (p. R-13) and proves you have a prior felony or felonies, your sentence can be increased proportionately, based upon the classification of the prior felony or felonies?

THE DEFENDANT: Yes.

THE COURT: I have before me an Exhibit A, and I have already asked you if you have any questions about this form. Do you have any questions about the form now?

THE DEFENDANT: No, sir.

THE COURT: All right. Now, has anyone forced you to come in and say you're guilty?

THE DEFENDANT: No, sir.

THE COURT: Has anybody offered you any money or anything of value to get you to say you're guilty?

THE DEFENDANT: No.

THE COURT: Has anybody told you if you pled guilty, it would be better on you,that I'd give you a light sentence or a particular sentence or give you probation or anything like that to get you to say you're guilty?

THE DEFENDANT: No.

THE COURT: Raise your right hand.

(p. R-14) (Defendant sways.)

THE COURT: You want to bring the jury around here? I am tired of putting up with him.

MR. SMITH: Let him get his breath.

(Pause.)

(Defendant sworn.)

THE COURT: All right. Well, if something is wrong with him, how did he get straight that quick?

MR. SMITH: Put your hand down. Let me ask some questions.

THE COURT: Let me ask. In case 85-1683, rape in the first degree, how do you plead?

THE DEFENDANT: Guilty, Your Honor.

THE COURT: All right. You want to ask him the questions?

MR. SMITH: All right. I was going to ask him about the other one. There's a statement on that one.

THE COURT: All right. In case 85-1684, burglary in the first degree, how do you plead? That's 85-1684.

THE DEFENDANT: Guilty, Your Honor.

MR. SMITH: I'd like to ask him a few questions. Mr. Smith, on about September 14th, 1985, did you go (p. R-15) over to this girl's house whose name is Vicky, I believe, cut the screen and go in there and have sex with her?

THE DEFENDANT: (No response.)

MR. SMITH: Did you do that?

THE DEFENDANT: Sir?

MR. SMITH: Had you --

THE COURT: Did you go over to the lady's house, cut the screen, and have sex with her?

THE DEFENDANT: Yes.

THE COURT: What time of morning was it, or was it night?

THE DEFENDANT: It was night, sir.

THE COURT: Beg your pardon?

THE DEFENDANT: It was night, sir.

THE COURT: Nighttime?

THE DEFENDANT: Yes.

THE COURT: About what time of night?

THE DEFENDANT: I can't say, sir.

THE COURT: Well, what time?

MR. JAMES: It was 1:30 in the morning.

THE COURT: About 1:30 in the morning?

THE DEFENDANT: Yes.

THE COURT: Did anybody give you permission to go in the house?

THE DEFENDANT: No.

THE COURT: How did you get in the (p. R-16) house?

THE DEFENDANT: (No response.)

THE COURT: How did you get in the house?

THE DEFENDANT: (No response.)

THE COURT: How did you get in the house?

THE DEFENDANT: (No response.)

MR. SMITH: He cut the screen and went through the window.

THE COURT: How did you get in the house?

THE DEFENDANT: (No response.)

THE COURT: Let him tell me. How did you get in the house?

THE DEFENDANT: (No response.)

THE COURT: What street?

MR. JAMES: Haton Avenue.

THE COURT: How did you get in Vicky's or whoever's house?

THE DEFENDANT: Through the door, sir.

THE COURT: Through the door? Don't the facts show he cut the screen and went through the window?

MR. JAMES: Yes.

THE COURT: What did you cut through, the screen to the window? What did you do?

THE DEFENDANT: Just went in, sir.

(p. R-17)THE COURT: What did you do?

THE DEFENDANT: Had sex with her.

THE COURT: Had sex with her. All right. Where did you have sex with her?

THE DEFENDANT: (No response.)

THE COURT: On the bed or the sofa or the floor or what?

THE DEFENDANT: (No response.)

THE COURT: Where did you have sex with her? On the bed or floor or where?

THE DEFENDANT: (No response.)

THE COURT: You want to ask him?

MR. SMITH: Tell the judge.

THE DEFENDANT: In the bed.

THE COURT: All right. In the bed. How were you – okay. Did she invite you in the house to have sex with her?

THE DEFENDANT: No, sir.

THE COURT: All right. Did he have any weapon?

MR. JAMES: A knife.

THE COURT: Did you have any kind of weapon?

THE DEFENDANT: A knife.

THE COURT: Butcher knife, pocket knife, or what.

(p. R-18)THE DEFENDANT: Butcher knife.

THE COURT: Where did you get that from?

THE DEFENDANT: (No response.)

THE COURT: Where did you get it?

THE DEFENDANT: I already had it, sir.

THE COURT: Where did you get it from when you first had it?

THE DEFENDANT: Found it, sir.

THE COURT: Where did you find it?

THE DEFENDANT: Just found it, sir.

THE COURT: Where?

THE DEFENDANT: (No response.)

THE COURT: You don't remember where you find the knife?

MR. SMITH: That's in the statement. He found it.

THE COURT: I understand that. You don't remember where you found the knife?

THE DEFENDANT: Just found it, sir.

THE COURT: All right. Just found it. Okay. And who pulled the clothes off, you or she? Which one pulled her clothes off?

THE DEFENDANT: She had no clothes on, sir.

THE COURT: All right. And you had a knife. (p. R-19) What else do the facts show?

MR. JAMES: She did have on clothes. She had on panties and he pulled – he was dressed in a ski mask.

THE COURT: How were you dressed?

THE DEFENDANT: I had under clothes on, sir.

THE COURT: What else did you have on.

THE DEFENDANT: Clothes? I had no clothes, sir.

THE COURT: You didn't have any clothes on. Did you have on a ski mask?

THE DEFENDANT: No, sir.

THE COURT: You were naked too?

THE DEFENDANT: Yes, sir.

THE COURT: What month was this?

MR. JAMES: September.

THE COURT: You were running around naked at that time of the morning?

THE DEFENDANT: Yes.

THE COURT: You got in the house and she didn't – you do you recommend that I accept the plea?

MR. SMITH: Yes, sir.

THE COURT: The Court finds you understand your constitutional rights and enter your plea (p. R-20) voluntarily, intelligently, and knowingly in 85-1683 and I accept your plea. In 85-1684, burglary in the first degree, I accept your plea.

Mr. Smith, he is having a problem, and to prevent you from having a problem, I'm going to revoke the bond and do a pre-sentence report. He looks like he's trying to go out on you.

MR. SMITH: Let me take him to the probation officer.

THE COURT: I will tell Mrs. Flack he is upstairs, and we will work with him that way. All right. Once he settles down, we will put him on bond. January 17th, at 8:30.

(Whereupon, all proceedings were adjourned until the sentencing hearing on January 17th, 1986, at approximately 8:30 a.m.)

THE COURT: State of Alabama versus James L. Smith. All right. Who are all of these folks?

MR. SMITH: Family and friends and well wishers.

MR. JAMES: The victim and (p. R-21) representatives from our office and the light house.

THE COURT: Is the victim here? I don't see any reason for the other folks to be up here. The victim should be here. I want to hear what she has to say.

MR. JAMES: Tell the judge what your feelings are about this, as a result of this incident.

THE VICTIM: Well, I think he should be punished and I think he should be made to feel the way I was feeling which was with a whole lot of fear and as of right now just a whole lot of fear. Any my children's fear of being at home with me or being at home period.

THE COURT: Yeah.

THE VICTIM: Before this happened, we were very secure, you know. Like I said, we are all afraid. And we're afraid if he gets out, he will do it again. And possible just to bother and bring harm to --

THE DEFENDANT: No, I didn't say that.

THE COURT: Basically, that's what you said. You told me in a letter (p. R-22) you did it. He did it because of some of the pressure he had with his problems with you. (Pointing defendan't [sic] girlfriend.) That's what he is saying. And that's what you said in your letter. I have both of the letters. You wrote me. I have both of the letters. You wrote me and told me all about he suspected you of doing something. I believe you perhaps weren't, but he suspected that. That's why he did it,

because he was having pressure with you. You want to read his letter?

DEFENDANT'S GIRLFRIEND: Yes

THE COURT: I – you want to read it?

DEFENDANT'S GIRLFRIEND: Yes.

THE COURT: Okay. You go back there and sit down and read it. This is the one you wrote him. Right here. See, I have yours too. In that letter, you sort of understand why he did it because of the suspicions he had which, perhaps, were unfounded, but he, at least, had them. You go back and sit down there and read it.

(p. R-23)MR. SMITH: I'll be back. I need to call my office.

(Pause.)

THE COURT: Are you satisfied he did it now?

DEFENDANT'S GIRLFRIEND: (Nods head to indicate the affirmative.)

THE COURT: Do you have anything to say as to why the sentence of law -- have a seat, if you want to.

(Victim exits.)

THE COURT: Do you have anything to say as to why the sentence of law shouldn't now be imposed against you?

THE DEFENDANT: No, sir.

THE COURT: You have a lot of good letters. And you have been in the penitentiary once, but not holding that against you, I will just let you know that.

MR. JAMES: The State moves to invoke the Habitual Offender Act and provides the Court with one certified copy of a prior conviction and would state to the Court that this charge carries a mandatory twenty year penitentiary sentence.

(p. R-24) THE COURT: All right. Do y'all admit or deny?

MR. SMITH: I didn't know anything about it, but it looks like that paper is all right and in order.

THE COURT: Are you satisfied with it? You want to ask him now about it? He doesn't have to tell you whether he admits or denies whether he was convicted in Huntsville.

THE DEFENDANT: Yes, sir. Forgery and receiving and concealing. I didn't know at the time even what a misdemeanor or a felony was.

THE COURT: You can talk to him, if you want. The law says he doesn't have to admit anything to me.

MR. SMITH: Yes, sir. Like I say, I didn't know a thing, but the papers are in order and I will say that. And apparently if he is the same James L. Smith that was up in Huntsville – I assume you got convicted up there.

THE DEFENDANT: Yeah. It was buying and receiving and concealing.

MR. SMITH: All right. Okay.

THE COURT: The Court hereby grants the (p. R-25) State's motion to invoke the Habitual Offender Act. Well, you know, I can't solve all of your problems, Mr. Smith,

and I'm not going to stand here a long time and try to lecture you. The problems you caused that lady is very damaging. I will be honest with you. I will be honest with you, you have got a lot of good letters here and a lot of folks must think a lot of good things about you, but with the damage you caused her mentally and I guess physically too, but surely physically, it cannot be radicated with one stroke of the pen. That's real sad. You just have to know how to control your problems. And from reading your wife's letter and your letter, you may have been overreacting to what you suspected. I doubt it was happening, but I am not the person to live with it. Do you have anything to say as to why the sentence of law shouldn't be imposed against you?

MR. SMITH: After talking to everybody, (p. R-26) he needs to go to Bryce's and be mentally evaluated. I don't know if he was in his right mind at the time of the offense when it was committed, or at the time that he pled guilty up here, based on that letter.

THE COURT: You know he was in his right mind when he pled guilty.

MR. SMITH: I know he almost fainted and he perspirated and his eyes rolled back in his head and all of that.

THE COURT: I'm not saying he was faking, but if he wasn't in his right mind, he wouldn't have stood up here when he pled and then straighten up the way he did.

MR. JAMES: The State strongly objects to him being sent to Bryce's and asks the Court to sentence the man to the maximum amount.

THE COURT: What is that?

MR. JAMES: Life.

MR. SMITH: I think based on the letters and all, – I didn't know about a prior record and all – life in this case would be inappropriate.

(p. R-27) THE COURT: He –

MR. SMITH: That would be cruel and unusual punishment.

THE COURT: He has a lot of good letters. He overreacted to what he suspected his wife of doing. No way can I radicate that. I know the pain and mental problems he caused this woman, and without any more, I am going to sentence him to thirty years in the penitentiary.

MR. SMITH: I put the Court on notice of appeal and ask the sentence to be suspended pending the appeal.

THE COURT: I cannot do that. It's over twenty years.

MR. JAMES: Also, there's restitution in the amount of – that's in case 85-16 – the rape was 85-1683.

THE COURT: That's in 85-1683. Do you have anything to say as to why the sentence of law shouldn't be imposed against you in case number 85-1684?

THE DEFENDANT: (No response.)

THE COURT: What is the sentence in this case?

MR. JAMES: It carries a sentence from (p. R-28) twenty to life.

THE COURT: Do you have anything to say as to why the sentence of law shouldn't now be imposed against you in 85-1684?

THE DEFENDANT: (No response.)

THE COURT: I sentence you to thirty years in 85-1684 to run concurrently with the sentence imposed in 85-1683. What is restitution?

MR. JAMES: $191.61.

THE COURT: I am going to order restitution in the amount of $191.61. I am going to order that the Director or the Commissioner of the Board of Corrections for the State of Alabama, that if you receive any money during the time while in the penitentiary, that he order his staff to deduct the amount of $191.61 from that and that's to be paid to the Clerk's Office of Montgomery County towards restitution in that case.

The Court is going to the exempt you from paying attorney fees -- I mean court costs. And you are retained, aren't you?

(p. R-29) MR. SMITH: Yes, sir.

THE COURT: I am going to note oral notice of appeal.

MR. SMITH: Yes. Both cases.

THE COURT: I am appointing you on the case. All right.

(Whereupon, all proceedings were adjourned.)

* * *

(p. R-30) *CERTIFICATE OF COMPLETION*

State of Alabama)
Montgomery County)

I, Melody J. Perkins, Official Court Reporter for the Fifteenth Judicial Circuit, do hereby certify that the foregoing twenty-nine computer-printed pages contain a true and correct transcription of the matters as reported by me in the matter of State of Alabama vs. James L. Smith, CC-85-1683 and CC-85-1684, as occuring on January 6th and 17th, 1986.

I further certify that an original and three copies of said transcript have this date been filed with the Clerk of the Original Court.

All pages are numbered serially and centered at the bottom of each page, the last of which appears at the bottom of this certificate.

Dated this the 20th day of February, 1986.

/s/ Melody J. Perkins
Melody J. Perkins
Official Court Reporter

Pre-sentence Investigation Report

ALABAMA BOARD OF PARDONS AND PAROLES

REPORT OF INVESTIGATION

Type of Investigation Pre-Sentence

Date Dictated 1/13/86

Name Smith, James Lewis True Name Same
Alias: Smith, James; Smith, James L.
RSA BM-26 DOB: 03-31-59 Height and Weight 5'11" - 160 lbs.
Complexion Dark Color or Hair Black Color of Eyes Brown
Bodily Marks None
Driver's License # Unknown SS# 423-80-6110
AIS#___ FBI#___ SID# AL00454742
Address 5316 Loisa Lane Phone # 281-5302
Montgomery, AL 36108
County Montgomery Case # 85-1683/1684
Offense(s) Rape I; Burglary I
Sentence(s) 30 Yrs. Pen / 30 years penitentiary concurrent.
Date of Sentence 1-17-86 Date Sentence began 1-17-86
Date of Arrest 09-18-85; Date of Bond 09-24-85;
01-06-86 None
Bond Amt. $5000; 2500
Judge Charles Price D.A. James H. Evans
Attorney Elno Smith Retained X Appointed___
Court Ordered Restitution $ 191.61
Barred from Parole (Ala. Code 15-22-27.1) Yes__ No X
NOTES:

PRESENT OFFENSE

County, Court, & Case Number:

Montgomery Co., CC #85-1683.

Offense:

Rape I.

Sentence:

Thirty (30) years penitentiary.

Date of Sentence:

January 17, 1986.

Details of Offense:

Reports reflect that on September 14, 1985, at approximately 1:30 A.M., a black male broke into the residence of Vickie Hurst, 4925A Hatton Avenue, Montgomery, AL, while Vicki[e] Hurst and her three children were at home. The black male, with a small knife in his possession, found Vickie Hurst in her bedroom and forced her to ingage in sexual intercourse with him. Although the victim did not see the black male's face, she recognized the voice of a man who sometimes stayed in the apartment complex where she lived. On September 18, 1985, Montgomery Police Officers had Vickie Hurst listen to voices of five black males and at that time she picked out the voice of James Lewis Smith.

Serious Physical Injury Barring Parole:

None.

Subject's Statement:

Subject admits having sex with the victim but states he did not force her.

Case Status of Co-Defendants:

None listed.

Victim Notification Information:

Vickie Hurst, BF, dob: 07-13-58, SSN: 418-84-6272, 4925A Hatton Avenue, Montgomery, AL, ph. 281-8543.

Victim Impact:

The victim impact report has been sent to Vickie Hurst. Should it be returned it will be summarized.

Location of Offense:

The present offense occurred within the city limits of Montgomery, AL.

Court Ordered Restitution:

$191.61

PRESENT OFFENSE

County, Court, & Case Number:

Montgomery Co., CC #85-1684.

Offense:

Burglary I.

Sentence:

Thirty (30) years penitentiary concurrent.

Date of Sentence:

January 17, 1986.

Details of Offense:

Reports reflect that on September 14, 1985, at approximately 1:30 A.M., a black male broke into the residence of Vickie Hurst, 4925A Hatton Avenue, Montgomery, AL, while in possession of a small knife and while Vickie Hurst and her three children were at home. Entry into the residence was made by cutting the screen of a rear window.

Although the victim did not see the black male's face, she recognized the voice of a man who sometimes stayed in the apartment complex. On September 18, 1985, Montgomery Police Officers had Vickie Hurst listen to voices of five black males and at that time she picked out the voice of James Lewis Smith.

Serious Physical Injury Barring Parole:

None.

Subject's Statement:

Subject admits breaking into the residence. He states he was having trouble with his girl friend and depressed.

Case Status of Co-Defendants:

None listed.

Victim Notification Information:

Vickie Hurst, BF, dob: 07-13-58, SSN: 418-84-6272, 4925A Hatton Avenue, Montgomery, AL, ph. 281-8543.

Victim Impact:

The victim impact report has been sent to Vickie Hurst. Should it be returned it will be summarized.

Location of Offense:

The present offense occurred within the city limits of Montgomey, AL.

Court Ordered Restitution:

RECORD OF ARREST

Prior Arrest Record:

09-19-75	PD Huntsville, AL CC #75-1072F	BRCSP	3Y pen.

09-19-75	PD Huntsville, AL CC #75-10-741F	GL, BRCSP	Np on 04-19-76
09-18-85	PD Montgomery, AL CC#85-1682	Sodomy I	Np on 01-06-86

Subsequent Arrest Record:

None located.

PERSONAL/SOCIAL HISTORY

Subject:

James Lewis Smith, age 26, BM, dob: 03-31-59, was the third of four children born to Leola McCrary in Huntsville, AL. James' father and mother were not married and James was raised in Huntsville, AL, by his mother until he was sent to prison in 1976. After being released from prison, Smith relocated in Montgomery and has lived here since.

Marital Status/History:

Subject was married to Doris Pollard, age and whereabouts unknown from 1981 until they divorced in 1984. No children were born of this union. Subject has one child by Edna Ford. The child's name is Ranine Ford, age 8, and currently resides in Huntsville, AL, with her mother. Subject states he is under court order out of Madison County to pay child support of $100 per month.

Health:

Subject states in 1981 he was hurt on the job and since that time has had back problems. He denies ever having seen a psychiatrist or psychologist.

Smith admits to the use of marijuana and states he began at age eight and used it regularly until he was approximately 16 years old. He states in the last 10 years he has used marijuana occasionally and last smoked a joint several months ago. He also admits to trying acid, speed and diet pills 10 to 11 years ago. Subject admits to the use of alcoholic beverages and states he drinks on social occasions.

Education:

Smith completed the 9th grade at Huntsvill High School, Huntsville, AL, in 1974. He states he in 1978 he attended the Montgomery Area Skill Center and secured his GED.

Financial Status:

Smith owns a 1974 Mazda and at this time has the following debts: two Visa credit cards, approximately $1800 at $90 per month; Money Express, $300 at $11 per month and child support of $100 per month. At this time subject is incarcerated and has no income.

Employment History:

For the last two years, Smith [has] been self-employ[e]d doing janitorial service and selling items thorough [sic] catalogs. The name of his janitorial service is Electro Janitorial and Home Cleaning Service and the name of the catalog sales is Catalogs International. He states that between the two businesses he makes approximately $5000 to $6000 per year.

H & H Janitorial Service, from 1982 until he went into business for himself in 1983.

Baptist Medical Center in their housekeeping department from 1979 until he hurt his back in 1981.

From 1981 through 1982, subject states he received Workman's Compensation for the injury to his back at Baptist Medical Center.

Military Record:

None.

Offender's Family:

Father: Lewis Columbus Humphrey, age 50, lives in the Huntsville, AL, area.

Mother: Leola Smith McCrary, age 48, lives at 310D St. Clair Avenue, Huntsville, AL, and is unemployed. As stated previously, subject's father and mother were never married.

Siblings:

Betty Jo Fletcher, age 30, lives in Huntsville, AL, and works at Big Spring Manor Nursing Home.

Carrie Jean Smith, age 28, lives in Huntsville and works at Big Spring Manor Nursing Home.

Doris Ann Smith, age 15, lives with her mother at 310D St. Clair Avenue, Huntsville, AL, and attends school.

EVALUATION OF OFFENDER

Psychological Reports:

None.

Reputation & Community Attitude:

I have received numerous telephone calls from people who state that James Lewis Smith had done house work for them, worked in their house while they were alone with him and they were never afraid. Other character references state that they do not believe he is capable to committing such an offense. Please see the attached letters of character reference.

Parole & Probation Officer's Remarks:

None.

PROBATION PLAN

Home:

If granted probation, subject states he will live at 5316 Loisa Lane, Montgomery, AL.

Job:

If granted probation, subject states he will continue his self-employment.

Recommendation:

I would recommend that probation be denied and that subject be sentenced to 20 years in the penitentiary in each case concurrent.

Signed and dated at Montgomery, AL, this 14th day of January, 1986.

/s/ Carolyn P. Flack
Carolyn P. Flack
Alabama Probation &
Parole Officer

CPF/lcm

ALABAMA BOARD OF PARDONS AND PAROLES

REPORT OF INVESTIGATION

Type of Investigation PRE-SENTENCE

Date Dictated 8/19/86

Name SMITH, JAMES LEWIS True Name SAME
Alias: SMITH, James; SMITH, James L.
RSA BM-27 DOB: 03-31-59 Height and Weight 5'11" 160 lbs.
Complexion Dark Color or Hair Black Color of Eyes Brown
Bodily Marks None
Driver's License # Unknown SS# 423-80-6110
AIS# ___ FBI# 256 662 EA9 SID# 00454742
Address 5316 Loisa Lane Phone # 281-5302
Montgomery, Alabama 36108
County Montgomery Case # 85-1682/1683/1684

Offense(s) Sodomy I/Rape I/Burglary I
Sentence(s) _____
Date of Sentence _____ Date Sentence began _____
Date of Arrest 09-18-85/01-06-86 Date of Bond
09-24-85/None Bond Amt. $5,000/$2,500 (2 cs.)
Judge Charles Price D.A. James H. Evans
Attorney John Cason Retained ___ Appointed XX
Court Ordered Restitution $_____
Barred from Parole (Ala. Code 15-22-27.1) Yes ___ No XX

NOTES: On January 6, 1986, CC #85-1682 – Sodomy I was nolle prossed and at that time, subject pled guilty to CC #85-1683 -- Rape I; CC #85-1684 – Burglary I. On Januray 17, 1986, James Lewis Smith was sentenced to 30 years in the penitentiary concurrent, and at that time, an oral notice of appeal was given. On July 16, 1986, the Alabama Court of Criminal Appeals reversed and remanded. Then on August 19, 1986 in a jury trial, James Lewis Smith was found guilty of Sodomy I, Rape I and Burglary I.

PRESENT OFFENSE

County, Court and Case Number:

Montgomery County, Circuit Court, CC #85-1682

Offense:

Sodomy I

Sentence:

Date of Sentence:

Details of Offense:

Reports reflect that on September 14, 1985 at approximately 1:30 a.m., a black male broke into the residence of Vickie Hurst, 4925-A Hatton Avenue, Montgomery, Alabama while Vickie Hurst and her three children were at home. The black male, with a small knife in his possession, found Vickie Hurst in ber bedroom and forced her to engage in oral intercourse with him. Although the victim did not see the black male's face, she recognized the voice of a man who sometimes stayed in the apartment complex where she lived. On September 18, 1985, Montgomery police officers had Vickie Hurst listen to voices of five black males and at that time, she picked out the voice of James Lewis Smith.

Serious Physical Injury Barring Parole:

None.

Subject's Statement:

Subject states he did not commit the offense.

Case Status of Co-Defendants:

None listed.

Victim Notification Information:

Vickie Hurst, black female, dob: 07-13-58, SSN: 418-84-6272, 4925-A Hatton Avenue, Montgomery, Alabama, telephone number: 281-8543.

Victim Impact:

In January, 1986 the victim impact report was sent to Vickie Hurst and 4925-A Hatton Avenue, Montgomery,

Alabama and she returned it. According to Ms. Hurst, since the burglary, sodomy and rape occurred, she is afraid to go into her house at night or be in her house at night and she sleeps during the day so she can stay awake at night. She further states that since the rape and sodomy, she feels helpless and sits each night waiting for someone to break in on her.

Location of Offense:

The present offense occurred within the city limits of Montgomery, Alabama.

Court Ordered Restitution:

PRESENT OFFENSE

County, Court and Case Number:

Montgomery County, Circuit Court, CC #85-1683

Offense:

Rape I

Sentence:

Date of Sentence:

Details of Offense:

Reports reflect that on September 14, 1985 at approximately 1:30 a.m., a black male broke into the residence of Vickie Hurst, 4925-A Hatton Avenue, Montgomery, Alabama while Vickie Hurst and her three children were at home. The black male, with a small knife in his possession, found Vickie Hurst in her bedroom and forced her

to engage in sexual intercourse with him. Although the victim did not see the black male's face, she recognized the voice of a man who sometimes stayed in the apartment complex where she lived. On September 18, 1985, Montgomery police officers had Vickie Hurst listen to voices of five black males and at that time, she picked out the voice of James Lewis Smith.

Serious Physical Injury Barring Parole:

None.

Subject's Statement:

Subject states he did not commit the offense.

Case Status of Co-Defendants:

None listed.

Victim Notification Information:

Vickie Hurst, black female, dob: 07-13-58, SSN: 418-84-6272, 4925-A Hatton Avenue, Montgomery, Alabama, telephone number: 281-8543.

Victim Impact:

The victim impact report was sent to Vickie Hurst, 4925-A Hatton Avenue, Montgomery in Janurary, 1986 and Ms. Hurst returned it. According to Ms. Hurst, that since the burglary, sodomy and rape occurred, she is afraid to go into her house at night or be in her house at night and she sleeps during the day so she can stay awake at night. She further states that since the sodomy and rape, she feels helpless and sits each night waiting for someone to break in on her.

Location of Offense:

The present offense occurred within the city limits of Montgomery, Alabama.

Court Ordered Restitution:

PRESENT OFFENSE

County, Court and Case Number:

Montgomery County, Circuit Court, CC #85-1684

Offense:

Burglary I

Sentence:

Date of Sentence:

Details of Offense:

Reports reflect that on September 14, 1985 at approximately 1:30 a.m., a black male broke into the residence of Vickie Hurst, 4925-A Hatton Avenue, Montgomery, Alabama, while Vickie Hurst and her three children were at home. During the burglary, the black male had a small knife in his possession. Entry into the residence had been made by cutting the screen of a rear window.

Although the victim did not see the black male's face, she recognized the voice of a man who sometimes stayed in the apartment complex. On September 18, 1985, Montgomery police officers had Vickie Hurst listen to voices of five black males and at that time, she picked out the voice of James Lewis Smith.

Serious Physical Injury Barring Parole:

N/A.

Subject's Statement:

Subject states he did not commit the offense.

Case Statuts of Co-Defendants:

None listed.

Victim Notification Information:

Vickie Hurst, black female, dob: 07-13-58, SSN: 418-84-6272, 4925-A Hatton Avenue, Montgomery, Alabama, telephone number: 281-8543.

Victim Impact:

The victim impact report was sent to Vickie Hurst, 4925-A Hatton Avenue, Montgomery in January, 1986 and Ms. Hurst returned the report. According to Ms. Hurst, that since the burglary, sodomy and rape occurred, she is afraid to go into her house at night or be in her house at night and she sleeps during the day so she can stay awake at night. She further states that since the rape and sodomy, she feels helpless and sits each night waiting for someone to break in on her.

Location of Offense:

The present offense occurred within the city limits of Montgomery, Alabama.

Court Ordered Restitution:

RECORD OF ARREST

Prior Arrest Record:

09-19-75	PD Huntsville, Al CC #75-1072-F	Buying, Receiving, & Concealing Stolen Property	3 Years Pen.
09-19-75	PD Huntsville, AL CC #75-10-741-F	Grand Larceny/ B.R.C.S.P.	Nolle Prossed on 04-19-76

Subsequent Arrest Record:

None located.

PERSONAL/SOCIAL HISTORY

Subject:

James Lewis Smith, age 27, BM, dob: 03-31-59, was the third of four children born to Leola McCrary in Huntsville, Alabama. James' father and mother were not married and James was raised in Huntsville, Alabama by his mother until he was sent to prison in 1976. After being released from prison, Smith relocated in Montgomery and has lived here since.

Marital Status/History:

Subject was married to Doris Pollard, age and whereabouts unknown from 1981 until they divorced in 1984. No children were born of this union. Subject has one child by Edna Ford. The child's name is Ranine Ford, age 8, and currently resides in Huntsville, Alabama with her mother. Subject states he is under court order out of Madison County to pay child support of $100 per month.

Health:

Subject states in 1981 he was hurt on the job and since that time, has had back problems. He denies ever having seen a psychiatrist or psychologist.

Smith admits to the use of marijuana and states he began at age eight and used it regularly until he was approximately 16 years old. He states in the last 10 years he has used marijuana occasionally and last smoked a joint several months ago. He also admits to trying acid, speed and diet pills 10 to 11 years ago. Subject admits to the use of alcoholic beverages and states he drinks on social occasions.

Education:

Smith completed the 9th grade at Huntsville High School, Huntsville, Alabama in 1974. He states in 1978 he attended the Montgomery Area Skills Center and secured his G.E.D.

Financial Status:

Smith owns a 1974 Mazda and at this time, has the following debts: two Visa credit cards, approximately $1800 at $90 per month; Money Express, $300 at $11 per month and child support of $100 per month. At this time, subject is incarcerated and has no income.

Employment History:

For approximately the last two years, Smith has been self-employed doing janitorial service and selling items

through catalogs. The name of his janitorial service is Electro Janitorial and Home Cleaning Service and the name of the catalog sales is Catalogs International. He states that between the two businesses, he makes approximately $5,000 to $6,000 per year.

H. & H. Janitorial Service, from 1982 until he went into business for himself in 1983.

Baptist Medical Center in their housekeeping department from 1979 unitl he hurt his back in 1981.

From 1981 through 1982, subject states he received Workman's Compensation for the injury to his back at Baptist Medical Center.

Military Record:

None.

Offender's Family:

Father: Lewis Columbus Humphrey, age 50, lives in the Huntsville, Alabama area.

Mother: Leola Smith McCrary, age 48, lives at 310-D St. Clair Avenue, Huntsville, Alabama and is unemployed. As stated previously, subject's father and mother were never married.

Siblings: Betty Jo Fletcher, age 30, lives in Huntsville, Alabama and works at Big Spring Manor Nursing Home.

Carrie Jean Smith, age 28, lives in Huntsville and works at Big Spring Manor Nursing Home.

Doris Ann Smith, age 15, lives with her mother at 310-D St. Clair- Avenue, Huntsville, Alabama and attends school.

EVALUATION OF OFFENDER

Psychological Reports:

None.

Reputation & Community Attitude:

I have received numerous telephone calls from people who state that James Lewis Smith had done house work for them, worked in their house while they were alone with him and they were never afraid. Other character references state that they do not believe he is capable of committing such an offense.

Parole & Probation Officer's Remarks:

None.

PROBATION PLAN

Home: If granted probation, subject states he will live at 5316 Loisa Lane, Montgomery Alabama.

Job: If granted probation, subject states he will continue his self-employment.

Recommendation:

I would recommend that probation be denied and that subject be sentenced to 25 years in the penitentiary in each case, concurrent.

Signed and dated at Montgomery, Alabama this the 20th day of August, 1986.

/s/ Carolyn P. Flack
Carolyn P. Flack
Alabama Probation &
Parole Officer

CPF:paf

Supplemental Record on Motion to Withdraw Guilty Plea

SUPPLEMENTAL RECORD

JAMES LEWIS SMITH

APPELLANT

VS

STATE OF ALABAMA

APPELLEE

CASE NUMBER CC-85-1683 & CC-85-1684-PR

ON APPEAL TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

FROM THE CIRCUIT COURT OF MONTGOMERY COUNTY

HONORABLE ELNO A. SMITH, JR., 25 WASHINGTON AVENUE, MONTGOMERY, ALABAMA
ATTORNEY FOR APPELLANT

ATTORNEY GENERAL, STATE OF ALABAMA, MONTGOMERY, ALABAMA
ATTORNEY FOR APPELLEE

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(p. R-1) IN THE FIFTEENTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
PLAINTIFF,	)	CC-85-1683-PR
VS.	)	
JAMES L. SMITH,	)	
DEFENDANT.	)	

SUPPLEMENTAL TRANSCRIPT

(MOTION FOR NEW TRIAL/ MOTION
TO WITHDRAW PLEA)

* * * * * * * * *

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(p. R-2) IN THE FIFTEENTH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	)	
PLAINTIFF,	)	CC-85-1683-PR
VS.	)	
JAMES SMITH,	)	
DEFENDANT.	)	

* * * * * *

Whereupon, the following proceedings occurred on March 17, 1985, at approximately 9:30 A.M. before the Honorable Charles Price, Circuit Court Judge, Fifteenth Judicial Circuit.

* * * * * *

APPEARANCES

FOR THE STATE OF ALABAMA:
Mr. Randall James, Esq.
Deputy District Attorney
District Attorney's Office
142 Washington Avenue
Montgomery, AL 36103

FOR THE DEFENDANT JAMES SMITH:
Mr. Elno Smith, Esq.
Smith, Cruse & Law
P.O. Drawer 789

(p. R-3) (Motion to withdraw plea/motion for a new trial.)

THE COURT: State of Alabama versus James Smith, 85-1684. He entered a plea of guilty in 85-1684 to rape and burglary and the Court sentenced him to thirty years in the penitentiary. Mr. Smith is here this morning on a motion to withdraw the guilty plea and a motion for a new trial. We will take the motion for new trial first, Mr. Smith.

MR. SMITH: All right, sir. Mr. Smith, if you will take the stand up there, please.

Your Honor, I believe we can hear these together.

THE COURT: That's fine. You want to combine them?

MR. SMITH: Yes, sir.

THE COURT: All of the evidence is going to be the same?

MR. SMITH: Yes, sir.

JAMES L. SMITH

Having been sworn, testified as follows:

DIRECT EXAMINATION

(By Mr. Smith:)

Q. State your name to the Court, please.

(p. R-4) A. James L. Smith.

Q. And Mr. Smith, you heard the Judge tell you what you were charged with.

A. Yes, sir.

Q. He also told you what your sentence was.

Now, do you recall when you were here on July 6th, 1986, when you entered a guilty plea what was your mental condition at that time?

A. I – I – I couldn't even say, sir. All I know is that I was – I couldn't see nothing. I couldn't hear anything. I didn't know – that's all I know. From what you told him on the day of sentencing, that I perspired, my eyes rolled in the back of my head, and I fainted. From what you said on the day, the 17th of January, that's all – I didn't know anything – I – like I said, I didn't know what had happened. All I knew – I didn't know what was going on. I didn't hear any questions; I didn't answer any questions. I didn't know what was happening, sir. That's all I know. From what you said on January the 17th, when you said I perspired and my eyes watered in the back of my head, and your Honor asked you if you – if you thought I was not capable of giving such a statement, why didn't you stop it? And I didn't know – I didn't hear your reply. I know of your Honor – I've seen the transcript. And, you know, and I didn't see a lot of things that was on the (p. R-5) transcript, I didn't see it happen. I didn't know what was happening. I say, well, I didn't – I never heard of any or none of this. I said, I didn't answer these questions. It seems like everybody was answering questions for me there. I didn't know – I was never asked. And I seen on the transcript where your Honor, he would say things like, you know, he was tired of this, and he'd say things like, you know, what's wrong with him? You know, I don't know. You know, I didn't know what was going on.

I didn't know whether I was there or whether I was not there. I didn't know the situation or what was going on at all.

Q. All right. Let me ask you this: are you guilty of this crime?

A. No, sir.

Q. You don't feel that you're guilty?

A. No, sir.

Q. And you don't have any recollection –

A. No, sir.

Q. – of what transpired –

A. No more –

Q. – on the 17th?

A. No more than what I read on the transcript, sir.

Q. And where did you get the transcript from?

A. My friend, she's the one that came down and got a copy, and she mailed me a copy.

Q. So you do have a copy of the transcript as (p. R-6) prepared in this case?

A. Yes, sir. I did have an opportunity to get a copy.

Q. You did have an opportunity to read it?

A. Yes. And like I said, the things that went on, I didn't – I wasn't aware of it. I, you know, uh – I noticed on the transcript you all answered a lot of questions that were asked me, but I never gave a response. And I know

the transcript said I would sway and that I would be, you know, that I couldn't hold myself up, which I was not even aware of. I only know this from the transcript itself.

Q. So if you read the transcript, you saw where I asked the Judge to have you sent to Bryce's to be evaluated, mentally evaluated, did you not?

A. Sir?

Q. You read now where I asked the Judge to send you to Bryce Hospital to have you examined?

A. I didn't understand the reasons why you were saying it, no more than I fainted and my eyes rolled back in my head, and you see, I couldn't have known what was going on. I couldn't have made the plea voluntarily or – supposedly, the crime I was supposed to have committed, if I did do it, I couldn't have been in my right mind when I done it. It didn't seem to me like anything was evidently concrete on the matter, but then too, I didn't understand anything that (p. R-7) was going on in the first place.

Q. And you are not guilty of this crime?

A. No, sir.

MR. SMITH: That's all I have, your Honor. Mr. James may want to ask you some questions.

CROSS EXAMINATION

(By Mr. James:)

Q. Do you have any problems today, Mr. Smith?

A. Well, I – I couldn't say, sir. I wouldn't know within myself.

Q. Well, Do you understand the questions I'm asking you?

A. Yes, sir, I understand.

Q. You don't recall Judge Price asking you questions under oath as to what took place on that day or on that night when you broke into that girl's house.

A. No, sir.

Q. And you are saying to Judge Price and the Court under oath that you didn't do this to this girl?

A. Yes, sir.

Q. All right. Did you write a letter to Judge Price?

A. My letter stated no such thing, sir. I never said – I said on the letter plainly that I'm not a rapist, I'm not a murder, I'm not a trouble maker, I am not – I told Judge Price to look my life over and see what kind of person (p. R-8) that I was because I wasn't that kind of person.

Q. Didn't you admit to your girlfriend that you had done it and that you were sorry?

A. No. No, sir, I never did. That – that wasn't said on that letter. I said no such thing on that letter.

Q. And you don't know what was wrong with you on that day?

A. What did you say, sir? I don't understand.

Q. You don't know what was wrong with you on that day?

A. Sir, all I know is what my attorney said on January 17th, that my eyes rolled back in the back of my head, and I perspired, and I fainted. And from the deputy – from the transcript, I saw something where the deputy asked what was wrong with me, and your Honor said there was nothing with me. He said I had to hold myself up. And from that time, I remember nothing. I noticed the transcript constantly said I swayed. And the Court would ask me questions four and five times with no response.

Q. You don't recall talking to your girlfriend prior to that plea and debating on whether to plea or to go to trial on the thing?

A. Sir, I – I – I am sure in the process of all of that, what was going on, I was so – whew, I don't know. I – I couldn't – I don't even have the words for it, to tell you the truth. (p. R-9) All I know is when this was taking place, I seen a place –

THE COURT: Hold on. All right. Go ahead.

A. I seen a place within the transcript where it said that I was told to raise my hand to swear in, but I – I don't remember swearing in to anything. And I noticed that the transcript says that something about if anything is wrong with him, how did he recover? And then right after that, my lawyer tells me to put my hand down. But I didn't – evidently, you know, I didn't even know I had my hand up, if I did have it up. I didn't – I didn't know what – I didn't know of anything that was taking place. For what reason, I can't even tell. All I know is what my lawyer said. When your Honor asked if there was any reason why my sentence shouldn't be invoked, that's

when he says because my eyes watered back in the back of my head, I perspired, and I fainted. I didn't know – I wasn't even present, as far I was concerned, because I didn't know of anything that was going on.

Q. Where were you, Mr. Smith, on September 14th, 1985, at 1:30 A.M.?

A. I – I don't know, sir. I couldn't recollect those days. I have no – no way of recounting for that day.

(p. R-10) Q. And how would you know about all of the things about going inside with no clothes on and going in with a knife, and the victim in this case, Vicky Hearst? How would you know all of those things if you were out of your mind?

A. I – I – I don't even remember saying any such things, sir.

MR. JAMES: I don't have any further questions.

MR. SMITH: That's all, your Honor.

THE COURT: Well, first of all, just a couple of observations from the bench. It's the Court's opinion at that time and it's still the Court's opinion that there was nothing wrong with you when you entered this plea.

(Defendant mumbling.)

THE COURT: First of all, you went in with Mr. Smith and you went over the Exhibit A and you signed that, you came out here and what you wanted to do was to engage in some more plea bargaining as to the particular sentence. And because you perhaps didn't get the particular sentence you wanted, that's what your concern is at this particular time.

(p. R-11) (Defendant mumbling.)

THE COURT: Now, when you stood right before me here and I asked you every question -- and you answered the questions. Nobody put in your mouth the testimony of what actually happened that night.

(Defendant mumbling.)

THE COURT: And as I recall, you stated to the Court that you went into the victim's home with no clothes on, with a knife, and you don't know where you got the knife from or you found the knife, et cetera, et cetera, et cetera. That, in addition to other testimony, corroborated with what the victim said had happened.

(Defendant mumbling.)

THE COURT: Now, first of all, you didn't faint. You perspired, and I guess, if I was or anybody was facing a rape charge, I would perspire just like anybody else.

(Defendant mumbling.)

THE COURT: There was some swaying that in the Court's opinion was exaggerated and faked. And the Court finds that there is (p. R-12) absolutely no reason to allow the defendant to withdraw any plea. And the defendant's plea was made knowingly, voluntarily, and intelligently. It followed everything the law requires. He was of sound mind, conscious of what he was doing, and there is no need to delay this case and/or anything else. The defendant knew what he was doing when he entered the plea. And he testified based on – substantially to what the victim said happened.

(Defendant mumbling.)

THE COURT: So, there is no need to allow the defendant to withdraw any plea. The plea was voluntarily and intelligently made, and made according to the

law. The Court is always cognizant of defendants when they make their plea. In fact, I would not accept a plea from someone that in my opinion is not cognizant of what he was saying or what he was doing, or if in any way the plea in my opinion was coerced, or the (p. R-13) defendant was misled or anything of that nature.

(Defendant mumbling.)

THE COURT: In addition to that, which is not part of my ruling here, I have received several letters, or at least two or three from the defendant. And all of them bear out and substantiate or corroborate his guilt in this particular case. Although that's not the point here, the point here is whether or not he should withdraw – the Court should allow him to withdraw his plea. I would only allow him to withdraw his plea if I found that the plea was not voluntarily made, intelligently made, or he was unaware of what was going on, or for some infirmary or illness, that he could not have entered into the plea voluntarily or intelligently, or if in any way that his lawyer or anyone misled him.

(Defendant mumbling.)

THE COURT: I found that Mr. Smith did exactly what any other criminal (p. R-14) lawyer would have done. He tried to do the best for his client that he could do, and that's all that has happened.

The defendant has to serve thirty years for rape and for breaking into this lady's house, and that's just that.

So, I deny your motion for new trial. And I deny your motion to withdraw your plea.

(Defendant mumbling.)

MR. SMITH: Thank you, your Honor.

THE COURT: All right.

(Whereupon, all proceedings were adjourned.)

(p. R-15) CERTIFICATION OF COMPLETION OF REPORTER'S TRANSCRIPT

STATE OF ALABAMA,	*	
	*	
Plaintiff,	*	CRIMINAL ACTION
	*	
VS.	*	CASE NUMBER
	*	85-1683
JAMES L. SMITH,		
Defendant.		

* * * * * * * * * * *

TO THE CLERK OF THE COURT OF CRIMINAL APPEALS:

I certify that I have this date completed and filed with the Clerk of the Trial Court, the original and three copies of a true and correct transcript of the evidence and matters designated by the parties.

I certify that a copy of this certificate has this date been served on the Clerk of the Appellate Court and Counsel for each of the parties.

DATED this 25th day of March, 1986.

/s/ Melody J. Perkins
MELODY J. PERKINS
Official Court Reporter

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA,	*	
PLAINTIFF,	*	CASE NO.:
VS.	*	CC-85-1683-PR
JAMES LEWIS SMITH,	*	CC-85-1684-PR
DEFENDANT.		

MOTION TO SUPPLEMENT AND MODIFY THE RECORD

(Filed March 21, 1986)

Comes now James Lewis Smith, and moves this Honorable Court pursuant to Rule 10(f) of the Alabama Rules of Appellate procedure to disclose what truly occurred in the Trial Court on the grounds that a material Hearing and Exhibit has been omitted from the Record.

In support of said Motion, Appellant would show unto the Court that the following events occured which are not reflected in the Record and which are omitted from the Record on Appeal filed by the Circuit Clerk of Montgomery County, Alabama:

1. On Wednesday, March 17, 1986, a hearing was held on a Motion for New Trial and Motion to Withdraw Guilty Plea.

2. At that hearing, which was denied, the Defendant appellant testified under oath as to his coercion, duress and involuntariness regarding the guilty plea in this case.

3. That the issue at this hearing is the issue this appellant wants to raise in the Court of Criminal Appeals.

4. That the transcript of this hearing has been omitted from this Record on Appeal.

WHEREFORE, THE PREMISES CONSIDERED, Appellant moves this Court to supplement and modify the Record in this case to disclose what truly occurred in the Trial Court.

Respectfully submitted,

/s/ Elno A Smith, Jr
ELNO A SMITH, JR.
ATTORNEY FOR APPELANT
SMITH, CRUSE & LAW
25 Washington Av.
Montgomery, Al. 36104

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above Motion for Modification of Record upon the Honorable James H. Evans, District Attorney for the Fifteenth Judicial Circuit of the State of Alabama, by handing him a copy of same this the 21 day of March, 1986.

/s/ Elno A Smith, Jr
ELNO A SMITH, JR.
ATTORNEY FOR APPELLANT

IN AND FOR THE FIFTEENTH JUDICIAL CIRCUIT
— MONTGOMERY, ALABAMA

STATE OF ALABAMA,	)	
	)	
Plaintiff,	)	CC-85-1683-PR
VS.	)	CC-85-1684-PR
	)	
JAMES LEWIS SMITH,	)	
Defendant.		

****

ORDER

Comes now this Honorable Court and states as follows:

1) That on the 20th day of February, 1986, proceedings in transcript form were filed in regards to the guilty plea and sentencing as occurring in the above-styled cause by the court reporter.

2) That on the 28th day of February, 1986, the trial transcript and the clerk's record were combined and filed with the Court of Criminal Appeals by the Clerk of the original court.

3) That on the 17th day of March, 1986, a hearing was held on a motion for a new trial and motion to withdraw guilty plea.

It is hereby ORDERED that the motion to supplement and modify the record is hereby GRANTED to include the March 17, 1986 hearing.

Done this the 25th day of March, 1986.

/s/ Charles Price
Charles Price
Circuit Court Judge

CLERK'S CERTIFICATE

JAMES LEWIS SMITH,	)	
	)	
APPELLANT,	)	
	)	CASE NUMBERS
VS.	)	CC-85-1683 & 1684-PR
	)	
STATE OF ALABAMA,	)	
APPELLEE.		

I hereby certify that the foregoing pages are a true and correct copy of the Petition to Supplement the Record the Order of Court granting Petition and the Court Reporter's supplement transcript.

I further certify that the original transcript of record on appeal was filed with the Court of Criminal Appeals on the 28th day of February, 1986, and this supplemental transcript is to be considered in connection with same.

DATED this the 31st day of March, 1986.

/s/ Debra P. Hackett
DEBRA P. HACKETT
Circuit Clerk
Montgomery County

Court of Criminal Appeals Opinion Reversing Respondent's Guilty Plea

James Lewis SMITH,

v.

STATE.

3 Div. 414.

Court of Criminal Appeals of Alabama.

July 15, 1986.

John C. Cason, Montgomery, for appellant.

Charles A. Graddick, Atty. Gen. and Victor Jackson, Asst. Atty. Gen., for appellee.

BOWEN, Presiding Judge.

James L. Smith pled guilty to first degree rape and first degree burglary. Sentence was thirty years' imprisonment in each case, the sentences to run concurrently.

Since a defendant waives several constitutional rights by pleading guilty, due process requires that the plea be a voluntary, knowing, and intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970). "Subsequent to *Boykin [v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)], it has become established that the defendant must be informed of maximum and minimum possible sentences as an absolute constitutional prerequisite to acceptance of a guilty plea." *Carter v. State*, 291 Ala. 83, 85, 277 So.2d 896 (1973). If the defendant has prior felony

convictions, he must be advised of the proper sentence to which he was subject under the Habitual Felony Offender Act. *Abbott v. State*, 459 So.2d 995, 996 (Ala.Cr.App.1984); *Miliner v. State*, 414 So.2d 133, 134-35 (Ala.Cr.App.1981). See also *Thompson v. State*, 441 So.2d 1058, 1059 (Ala.Cr.App.1983); *Hall v. State*, 418 So.2d 946, 948 (Ala.Cr.App.1982); *Alston v. State*, 414 So.2d 488-89 (Ala.Cr.App.1982); *McGhee v. State*, 412 So.2d 327, 328 (Ala.Cr.App.1982). "The reason a defendant must be advised of the maximum sentence he could receive in pleading guilty is so that his plea will represent a knowing and intelligent choice among known alternatives." *Chapman v. State*, 412 So.2d 1276, 1277 (Ala.Cr.App.1982).

The record reveals that Smith was never informed of the proper sentences he could receive. Smith was separately indicted for first degree rape and first degree burglary. On January 6, 1986, Smith signed an "explanation of rights and plea of guilt" form, which stated in pertinent part:

> "Under the indictment returned against you in this case by the Grand Jury of this county, you are charged with the crime of *Burglary 1st and Rape 1st* which is a Class *A* felony. In the event you plead guilty to said crime, . . . the law provides for punishment in the penitentiary for not less than *15* nor more than *life* for such offense. . . . Provided further that at a sentencing hearing should the State of Alabama prove to this Court that prior to committing this offense, you have previously been convicted of any one (1) felony, then the said imprisonment term must be for not less than *N/A* nor more than ___, . . . "

This form did not inform Smith that he would receive two separate sentences or that he would be sentenced as a habitual felony offender. Additionally, the form did not

state the correct potential sentence for the first time conviction of a Class A felony which is "for life or not more than 99 years or less than 10 years." Alabama Code 1975, § 13A-5-6.

On January 6, 1986, before accepting Smith's guilty pleas, the circuit court judge advised him that the potential sentence for rape in the first degree was "ten years up to life in the penitentiary" and that the potential sentence for burglary in the first degree was "ten years up to life." the judge also informed Smith, "If you have any prior felony or felonies, of course, and the State moves the Court to invoke the Habitual Offender Act and proves you have a prior felony or felonies, your sentence *can* be increased proportionately, based upon the classification of the prior felony or felonies." (Emphasis added.) This instruction does not satisfy the constitutional requirement that the accused be informed of the minimum and maximum potential sentence and is misleading in that it affords the impression that the application of the Habitual Felony Offender Act is discretionary. Before the guilty pleas were accepted, Smith did not acknowledge any prior conviction and the prosecutor made no indication that any existed.

On January 17, 1986, the sentencing hearing was held, at which time the following occurred:

> "THE COURT: You [Smith] have a lot of good letters. *And you have been in the penitentiary once, but not holding that against you,* I will just let you know that.
>
> "MR. JAMES [Assistant District Attorney]: The State moves to invoke the Habitual Offender Act and provides the Court with one certified copy of a prior conviction and would state to the Court that this charge carries a mandatory twenty year penitentiary sentence." (Emphasis added.)

The judge granted the State's motion and the prosecutor requested that Smith be given a life sentence. Defense counsel opposed this recommendation and stated that he "didn't know about a prior record." The judge stated that he was going to impose a thirty-year sentence and asked the prosecutor, "What is the sentence in this case?" The prosecutor replied, "It carries a sentence from twenty to life." The judge then sentenced Smith: "I sentence you to thirty years in 85-1684 [burglary] to run concurrently with the sentence imposed in 85-1683 [rape]."

It is somewhat difficult to comprehend the logic of the appellate argument of the Assistant District Attorney (who has filed a memorandum brief in this Court) that Smith's plea was knowingly and intelligently entered when that very same prosecutor misstated the potential range of sentences in the circuit court. Alabama Code 1975, § 13A-5-9, provides that upon conviction for a Class A felony, the punishment for an offender with one prior felony conviction is "imprisonment for life or for any term of not more than 99 years but not less than 15 years."

The confusion in the circuit court is evidenced by the State's positions on appeal. The Attorney General, apparently under the belief that Smith had two prior convictions, initially responded to the appellant's brief by declining to file a brief and requesting that the cause be remanded "for proceeding in accord" with *Miliner*, supra, and other cases. Subsequently, the Attorney General requested to be permitted to withdraw this response on the ground that "[i]t appears from the record that the defendant may have had two prior felony convictions, thus making the minimum and maximum sentences as given by the trial court incorrect. However, appellee now knows that the defendant has only one prior felony."

The Attorney General's new knowledge is gained from the "memorandum brief" filed in this Court by the Assistant District Attorney. The "exhibits" attached to this brief, including the judgment entries of the Circuit Court of Madison County, have not been made a part of the record on appeal and are not properly before this Court. *Tyus v. State*, 347 So.2d 1377, 1379-80 (Ala.Cr.App.), cert. denied, *Ex parte Tyus*, 347 So.2d 1384 (Ala.1977).

Before the circuit judge accepted Smith's guilty pleas, he only informed him of the minimum and maximum sentences for a first-time felony offender. Therefore, whether Smith was actually sentenced as a felony offender with one or two prior convictions is insignificant, for, in either event, Smith was not advised of the correct potential sentence *before* he pled guilty.

"It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Boykin*, 395 U.S. at 242, 89 S.Ct. at 1711. Under these circumstances, this Court has no alternative but to reverse the judgment of the circuit court and remand this cause for further proceedings.

REVERSED AND REMANDED.

All Judges concur.

Motion to Recuse Trial Judge on Retrial

Tr. PP 431-432

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA	•	
	•	CASE NOS.
VS.	•	CC-85-1682-PR
	•	85-1683-PR
JAMES LEWIS SMITH	•	85-1684-PR
	•	

MOTION TO RECUSE

(Filed August 4, 1986)

By this motion the Defendant, James Lewis Smith, moves that the Honorable Charles Price, Judge of the Circuit Court of Montgomery County, Alabama, recuse himself, shows the following:

1. The Honorable Charles Price has prior to this date taken a guilty plea from said defendant and heard substative facts from the said defendant that would inflame and prejudice his ruling in a new trial.

2. The Honorable Charles Price has been in ex parte communications with the defendant prior to his former guilty plea, and said ex parte communications inferred a presumption of guilt by the defendant to the Honorable Charles Price and as such, would highly prejudice objective rulings by the trial judge in said case.

3. The defendant feels that should the Honorable Charles Price fail to disqualify himself, his impartiality might be open to question under the guidelines promulgated both by the American Bar Association and the Supreme Court of Alabama. Under those guidelines, judges should disqualify themselves not only when their

impartiality is in question, but they should disqualify themselves in order to avoid the very appearance of impropriety.

4. It is important to the integrity of the criminal justice system that the public's confidence in the impartiality of its judiciary not be eroded by the appearance of bias.

WHEREFORE, it is respectfully prayed that the Honorable Judge Charles Price recuse himself, or in the alternative, that an evidentiary hearing be held to divulge the facts herein and that said Judge then recuse himself.

Respectfully submitted,

/s/ John C. Cason
JOHN C. CASON
Attorney for the
Defendant

OF COUNSEL:

PERRY O. HOOPER, SR.
503 South Court Street
Suite 320
Montgomery, Alabama 36104
(205) 834-3200

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion to Recuse upon the Honorable Terry Travis, Assistant District Attorney, Montgomery County, Alabama by hand delivery on this the 4th day of August, 1986.

/s/ John C. Cason
OF COUNSEL

Supplemental Motion to Recuse

Tr. PP 484, 485

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA	*	
Plaintiff,	*	CASE NOS.
VS.	*	CC-85-1682-PR
JAMES LEWIS SMITH	*	85-1682-PR
Defendant.	*	85-1683-PR

SUPPLEMENTAL MOTION IN SUPPORT OF TRIAL JUDGE TO DISQUALIFY HIMSELF

(Filed August 12, 1986)

COMES NOW the Defendant James Lewis Smith by and through his attorneys of record and respectfully moves this Court, the Honorable Charles Price, to voluntarily disqualify himself from sitting on the trial of this case. In support of his motion the Defendant states as follows:

1. That on or about January 1, 1986, the above trial Judge accepted a plea of guilty on behalf of the Defendant for one count of rape and one court of burglary.

2. Pursuant to this plea of guilty said trial Judge sentenced Defendant to thirty (30) years concurring in the penitentiary of the State of Alabama.

3. The Defendant, after imprisonment, of course bonded with said trial Judge by the United States Mail requesting a reversal on the guilty plea and a demand for a trial.

4. Defendant is now before the same Judge charged with the same indictments heretofore brought in this

Court, and it is Defendant's fear that the Court, having expressed himself as aforesaid after a reconsideration of the previous sentence, will not, if required by a verdict of plea, impose an unbiased, non-prejudiced sentence based on facts and circumstances herein charged.

Accordingly, the Defendant respectfully requests that the Court run an Order of Disqualification disqualifying himself and to transfer this case to another judge for trial.

Respectfully submitted,

/s/ John C. Cason
JOHN C. CASON
Attorney for the
Defendant

OF COUNSEL:

PERRY O. HOOPER, SR.
503 South Court Street
Suite 320
Montgomery, Alabama 36104
(205) 834-3200

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon the Honorable Terry Travis, Deputy District Attorney, Montgomery County, Montgomery, Alabama by placing same in the United States Mail postage prepaid this the 12th day of August, 1986.

/s/ John C. Cason
OF COUNSEL

Hearing on Motion To Recuse

(p. R-6) RECORD ON THE RECUSAL –

THE COURT: Just a moment. The first motion the court will take up is the motion to recuse. All right. Make you argument.

MR. CASON: Your Honor, our client, based on the fact that he gave a prior guilty plea and conferred with the court as to the substantive issues evolving around this particular case, the defendant has asked that the trial judge recuse himself from the case based on that former guilty plea and sentencing, and, also, based on the fact that he claims he did have ex-parte with the trial judge by sending letters through the United States mail to the trial judge.

THE COURT: That's not ex-parte, because I get mail from people all the time –

MR. CASON: Yes, sir.

THE COURT: – from inmates; those that are charged, those that are not. I don't share those with anyone and really don't take much action on them.

MR. CASON: Yes, sir.

(p. R-7) THE COURT: If that is the ground for the motion, the motion is hereby denied. The guilty plea was overturned by the Court of Appeals. I don't take any position on it one way or another. It's a trial by jury. The jury will decide the guilt or innocence of the defendant in this case. That motion is denied.

MR. CASON: Your Honor, we had another broad motion that would go along with that –

THE COURT: Is that the supplemental motion?

MR. CASON: Yes, sir. The supplemental motion and we filed another motion requesting that on certain issues, namely trial judge recusing himself, and motions in limine, suppression hearing, so forth, that if they were not in favor of the defendant, that the court – we have asked the court to stay the proceedings to certify these issues to the Court of Criminal Appeals.

THE COURT: I will get to that particular motion.

MR. CASON: All right, sir.

THE COURT: I will deal with each motion as (p. R-8) they come up.

MR. CASON: All right, sir.

THE COURT: Motion for the individual voir dire and sequestration of jurors during voir dire. All right. State your grounds.

MR. CASON: Your Honor, in that particular case, you know, we feel that it's going to be absolutely necessary to individually question these particular jurors on several issues.

First of all, Mr. Smith had pled guilty once before. It's very imperative that anyone in that voir dire not know anything about this case whatsoever, whether he has read it in the newspaper or seen it on three television stations or the various radio stations, you know, where the reversal came down and the newspapers published James Lewis Smith who formerly pled guilty to rape and sodomy, that will prejudice our client.

THE COURT: The court will voir dire the jury. You are permitted to submit any

* * *

Motion for New Trial

IN THE CIRCUIT COURT FOR
MONTGOMERY COUNTY, ALABAMA

STATE OF ALABAMA, Plaintiff,	•	
VS.	•	Case Nos. CC-1682/83/84-PR
JAMES LEWIS SMITH, Defendant.	•	

MOTION FOR NEW TRIAL

(Filed August 21, 1986)

COMES NOW the Defendant, by and through his attorney, John C. Cason who moves this Court to set aside the verdict entered in this cause on July 19, 1986, and grant to the Defendant a new trial. As grounds therefore, the Defendant shows as follows:

1. This Court's denial of the Defendant's Motion for the Trial Judge to Recuse himself was erroneous.

2. This Court's denial of the Motion to Suppress all evidence obtained following the custodial interrogation of the Defendant was erroneous and extremely prejudical [sic] to the Defendant's case.

3. The State failed to establish a prima facie case; accordingly, this Court's denial of the Defendant's Motion for Entry of Verdict of Acquittal at the close of State's evidence was erroneous.

4. The verdict of the jury was against the weight of the evidence.

5. The verdict of the jury was contrary to law.

WHEREFORE, the premises considered, the Defendant moves this Court to grant him a new trial in the above-styled cause.

Respectfully submitted,

/s/ John C. Cason
JOHN C. CASON
Attorney for
Defendant

/s/ Thomas J. Travers
THOMAS J. TRAVERS
Attorney for
Defendant

OF COUNSEL:

PERRY O. HOOPER, SR.
503 South Court Street
Suite 320
Montgomery, Alabama 36104
(205) 834-3200

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing *Motion for New Trial* upon the Honorable Terry Travis, District Attorney's Office, Montgomery County, Alabama, 142 Washington Avenue, Montgomery, Alabama 36192-2501 by hand delivery this the 22nd day of August, 1986.

/s/ Thomas J. Travers
OF COUNSEL

Second Sentencing Hearing After Jury Trial

(p. R-395) RESPONDED IN THE AFFIRMATIVE.)

THE COURT: Mr. Smith, come forward. (Complies.)

THE COURT: The jury having found you guilty of sodomy in the first degree, rape in the first degree, and burglary in the first degree, the court hereby accepts these verdicts. Let the record show the jury is still in the box. I will record these verdicts on the proper court documents and set your case for sentencing on Friday morning, August 22nd at 8:30. Let Mrs. Flack know he is upstairs. All right. Take him up.

MR. CASON: Your Honor, we would waive the presentence report since there was –

THE COURT: All right. We do it Friday morning. I want Mrs. Flack to see him. All right.

– (Whereupon, all trial proceedings were adjourned.)

SENTENCING HEARING

(p. R-396) (Whereupon, the following proceedings occurred on August 22, 1986 as a matter of record with the defendant present:)

THE COURT: State of Alabama versus James Lewis Smith. Mr. Smith, you entered a plea of guilty to rape and burglary, and the court sentenced you to thirty years on a plea bargain agreement. However, the Court of Appeals reversed that on the grounds that you were not advised as they saw it to the minimum/maximum sentence that could have been imposed against you. The court, of

course, then had a trial in your case. You are here now for sentencing at this time.

Do you have anything to say as to why the sentence of law shouldn't now be imposed against you? Do you have anything to say?

THE DEFENDANT: Well, I guess not.

THE COURT: Does the state have anything?

MR. TRAVIS: Thie [sic] victim, Ms. Hurst, is here to tell the court anything she feels would be appropriate.

(p. R-397) THE COURT: Well, I have heard her testimony. I don't know of anything else that –

MR. TRAVIS: I'd like her to have an opportunity on the record to tell the court for purposes of sentencing what she would like to.

THE COURT: Well, what do you want to tell me?

MS. HURST: I think that he should get life because in a way I have gotten life.

THE COURT: Anything else?

MS. HURST: No.

THE COURT: Does the state have anything else?

MR. TRAVIS: I would make a motion for the Habitual Offender Act. There is one prior felony. That would make the sentence, the minimum and maximum fifteen to life, as I understand it. Now, there also has been a weapon used in these offenses, specifically a knife, which would make the minimum number and maximum twenty to life.

THE COURT: All right. Anything else?

MR. TRAVIS: I believe –

(p. R-398) THE COURT: Do you have a certified copy of the prior sentence?

MR. TRAVIS: I believe it's in the court's files from the court's prior pleas. It probably went up with the appeal on the plea before. It's in 85-1684. As a practical matter, the Habitual Offender Act would be lesser of a sentence than the fact there was a weapon involved.

THE COURT: I understand. Do you move to invoke the Habitual Offender Act?

MR. TRAVIS: I do because it's mandatory. As a practical manner, the sentence without the habitual offender would be less of a sentence than actually the mandatory with the weapon being used.

MS. FLACK: You have the original and I have the copy. Is that good enough?

THE COURT: Here is a certified copy which proports to be a certified copy from Madison County, case 75-10742-F from April 23, 1976, which proports to show the defendant was sentenced to three years in the penitentiary for the crime of burglary, grand larceny, buying and (p. R-399) receiving stolen property. And he was found guilty of buying and receiving and concealing stolen property on April 19, 1976. And the order further reads: after having been denied the further benefits of probation, he is hereby sentenced to the penitentiary for a period of three years as punishment. That is signed by Younger from the circuit court of Madison County.

Does he admit or deny?

THE DEFENDANT: Yes, sir.

MR. CASON: Adimit. [sic]

MR. TRAVERS: Admit, your Honor.

THE COURT: As I stated, your sentence can now be a minimum sentence – with the prior conviction, it would be from fifteen to life. However, since a weapon has been used – do you have the statute?

MR. TRAVIS: The statute concerning the weapon? Yes, sir.

THE COURT: Give it here. Let me put it in the record.

MR. TRAVIS: 13A-5-6, SUB (A)(4).

(p. R-400) THE COURT: All right. Let's read it.

MR. TRAVIS: For a class A felony in which a firearm of dealy weapon was used or attempted to be used during the commission of the felony, the minimum sentence is not less than twenty years.

THE COURT: So the sentence based on the Habitual Offender Act was fifteen to life; however, based on the weapon, from twenty to life. Okay. And you have had a trial. In addition to that, you charge of sodomy was reinstated against you which was nolle prossed based on the plea bargain agreement of a plea to rape and burglary. And of course, after the case was reversed, the sodomy charge was reinstated. Okay.

MR. TRAVIS: I would also point out to the court that at the time of the plea, the court was only aware and

was of the impression that it was only one sex act, that only one sex act took place. The court is now aware that five separate sex acts occurred, through the testimony.

(p. R-401) THE COURT: You had a trial and were convicted of rape, burglary and sodomy in the first degree. When you entered your plea, you told me your side of the story. And of course, now that the court has had a trial and heard all of the evidence – and the court by no means would increase your punishment beyond thirty years for rape and burglary on the fact that you were successful on your appeal because this court doesn't get into punishing or attempting to punish people for exercising all of their constitutional rights which is to appeal from a conviction or plea, or to have a trial if you so desire. There is nothing this court does which should be viewed as punishment for a successful appeal. I hope we all understand that. But under North Carolina versus Pearce, 395, [sic] U.S. 711; 23, [sic] L. Ed., [sic] 2d, [sic] 656; 89 S. Ct., [sic] 2072, the court finds that since I did not hear all of the testimony during your plea and now at trial have heard (p. R-402) all of the testimony which consisted of raping the victim at least five times, and after the second or third time, then causing her to perform oral sex on you, and then of course, your performing oral sex on her, and then of course, at least raping her one or two more times after that, threatening her life with the knife and all, after looking at this matter, and your mental outlook on it and your position during the trial and what you said, the court finds that it's proper to increase the sentence beyond that which was given to you on the plea bargain.

Okay. In addition to that, the Habitual Offender Act has been imposed. And taking everything into consideration from the events of the crime, in the case of 85-1684, burglary in the first degree, do you have anything to say now after the court has explained to you its position on after hearing all of the evidence that was presented during the trial? Do you have anything to say (p. R-403) before I sentence you?

THE DEFENDANT: No, sir.

THE COURT: In case number 85-1684, burglary in the first degree, the court hereby sentences you to life in the penitentiary.

In case 85-1682 in which you're charged with the criminal offense of sodomy in the first degree, do you have anything to say as to why the sentence of law shouldn't now be imposed against you?

THE DEFENDANT: No, sir.

THE COURT: The court hereby sentences you to life in the penitentiary.

In case number 85-1683, the sentence is from twenty to any years to life; is that correct?

MR. TRAVIS: Yes.

THE COURT: The court is going to order the sentence imposed in 85-1682 to run concurrent with the sentence imposed in 85-1684.

In case number 85-1683, you're charged with the criminal offense of (p. R-404) rape in the first degree. Do you have anything to say as to why the sentence of law shouldn't be imposed against you?

THE DEFENDANT: No, sir.

THE COURT: The court is going to sentence you to 150 years in the penitentiary.

MR. TRAVIS: The state moves at this time for restitution in the amount of $292.16.

THE COURT: The court is going to order restitution in the amount of $292.16 and the court is going to order the commissioner of the the [sic] Board of Corrections – if you receive any money while in the penitentiary, he is to instruct his staff to deduct $292.16 to pay into the clerk's office of Montgomery County as restitution in this case.

The court is going to order that you pay court costs in this matter and order the commissioner of the Board of Corrections that if you receive any money while in the penitentiary, that he instruct his staff to deduct a certain amount to be paid into the clerk's (p. R-405) office of Montgomery County as court costs in this matter. That's in each case.

The court is going to order that if he is ever released from the penitentiary, that within six months of your release, you are to pay the court costs in each case.

The court further orders you to pay $25.00 to the clerk's office to be paid to the victims compensation fund.

The court is going to instruct the commissioner of the Board of Corrections that if you receive any money while in the penitentiary that he instruct his staff to deduct $25.00 in each case to be paid into the clerk's office of Montgomery County to be paid to the victims compensation fund. If you are released from the penitentiary,

within six months after your release, this money is to be paid.

MR. CASON: Rape one, is that to run concurrent?

THE COURT: Consecutive.

(p. R-406) MR. TRAVERS: We would ask for a motion for a new trial.

THE COURT: I will set it down for a hearing.

(Whereupon, all proceedings from this hearing were adjourned.)

MOTION FOR NEW TRIAL

(Whereupon, the following proceedings occurred on August 29, 1986, and Mr. Cason waived his client's presence.)

THE COURT: All right. This is a hearing in the case of the state of Alabama versus James Lewis Smith. Motion for new trial. All right.

MR. CASON: We have filed a motion for new trial. The premise behind that is: first, recusal of the trial judge. Prior to trial, the defense attorneys had requested recusal which was denied, and we feel like the sentence inflicted in this particular case is even that much more reason for recusal.

Our second element in asking for a motion for new trial is the suppression which was denied by the (p. R-407) trial court. Again, we reiterate for the record there were no formal rights read to the individual at the time that he was arrested. Let me correct that. There was no

formal reading of his rights at the time that he was in custodial interrogation. In addition, there was no testimony to the fact that he was actually arrested and read his rights after being arrested.

Thirdly, we feel that the lineup that was done at the police station was highly too suggestive and should have been suppressed.

Fourthly, we definitely feel the only Miranda warning read to Mr. Smith at 10:02 in the morning was a deprivation of his constitutional rights in that the warning that the Montgomery Police Department uses does not reflect a proper Miranda warning.

More importantly and finally, under the suppression hearing, we feel as though the evidence showed that the probable cause of the Montgomery Police (p. R-408) Department was simply the fact that based on at that time some uncredible type of testimony was given of quote an individual raking a yard unquote. The record shows that the victim in this particular case told the police that someone quote named James raped me unquote.

THE COURT: I understand the probable cause. It's not based on the fact that someone was raking the yard. I understand it was probable cause based on the fact that the victim said a guy named James that lived two apartments up living with a woman named Katie Gardner raped me and they went looking for – went canvassing the area and found a fellow raking the yard and asked about a James who lived with Katie Gardner, and he said that he was up at Dobey's Inn. That's what I remember it to be.

MR. CASON: Right. Fifthly, as far as a prima facie case, we feel the state had a burden to prove each and every element beyond a reasonable doubt, and one (p. R-409) element of rape is the fact that it must be proven that the victim and the defendant are not married. This element was never proven to the trial court.

THE COURT: That they are not married?

MR. CASON: Yes. That they are not married to each other. This was not proven. I don't believe it can be inferred from the record that they were married. This is an absolute element that we feel has to be proven to the trial court. As such, a motion for directed verdict of acquittal, this was denied.

And finally, we feel like the sentence was excessive. Based on the case law the trial court quoted to us at sentencing, we interpret that case law to say that it's not based on testimony heard within the case that can reflect an increase of sentence, but based on facts which are heard or about events that take place prior to trial after the initial crime has been committed that warrants an increase in the sentence, not the substantive issues of the case.

(p. R-410) THE COURT: Well, between the first trial and the second trial, the events became apparent.

MR. CASON: Yes.

THE COURT: That's when he wrote the court and admitted that he raped the woman.

MR. CASON: Right. Which we feel goes to the substantive issues involved in the case. We contend that that

case law goes to – the increase of sentence goes to material things that occur after the initial crime has been committed.

THE COURT: Well, one of the material things was that –

MR. CASON: That would aggregate the circumstances, obviously, to listen to the victim when the court took the plea given the facts to accept the plea bargain that was reversed.

THE COURT: The court had no knowledge that he raped the woman five times, and he didn't contradict that. He sodomized her twice by him performing oral sex on her and then he on her, with the children across the hall, with the knife (p. R-411) basically at her throat at all times except when he so-called put it in her hand and pointed it towards him and said do to me what you want to do at 1:00 or 2:00 A.M. with a ski mask on, who has gotten through the window as shown with the screen being missing, and that was not – the court was not aware of that at the plea. I feel like perhaps the sentence may not have been harsh enough.

MR. CASON: Yes, sir.

THE COURT: All right. On the other points of your motion, it's denied on the issue of suppression and recusal and the others. The court has already stated my position on recusal. I don't know of any reason why I should have rescused myself. It's just another case that I tried. I had no preconceived idea about the case between the time the plea bargain was reversed – I felt no different at that time of the trial than before the trial, saying that I

had no thoughts at all perhaps. Your motion is denied on that ground.

(p. R-412) The lineup suggested either – there is no scintilla of evidence to suggest that that was wrong. The motion is denied on those grounds.

On the warrant, I issued a ruling on that. Denied on that.

MR. CASON: One other thing, your Honor. We filed a motion for new trial based upon the premise that certain evidence was precluded based on the fact that it could not come into evidence because of the rape shield law. We question the constitutionality of the rape shield law.

THE COURT: The legislature enacted it and the Courts of Alabama have upheld it. I ruled on whatever you wanted to get in, that if it was protected by the rape shield law, you couldn't get it in. Appellate courts and the legislature have said that. I went by that.

MR. CASON: We are putting in the record that it is unconstitutional.

THE COURT: Your motion is denied on all points. I will make this hearing and my (p. R-413) ruling part of the record.

MR. CASON: Thank you, Judge. We would like to give the court oral notice of appeal.

THE COURT: All right. The court accepts the oral notice of appeal. However, file a written notice. Plus, is the defendant – yes, he is indigent. Go ahead and file a motion on that.

MR. CASON: Your Honor, if we may do this, if it's appropriate: as far as myself, I would like permission to withdraw from the appeal and let Mr. Travers who worked on this case pro bono to be appointed to take it up on appeal.

THE COURT: Motion denied. The court appoints you to represent the defendant on appeal. All right. You are all in the same office, and whoever does the work, I don't know. All right.

(Whereupon, all proceedings from this hearing were adjourned.)

Court of Criminal Appeals Opinion Affirming Conviction and Enhanced Sentence

MAY 26 1987

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1986-87

3 Div. 574

James Lewis Smith

v.

State

Appeal from Montgomery Circuit Court

CLARK, RETIRED CIRCUIT JUDGE

This is an appeal from judgments of conviction and sentence following a jury trial in which defendant-appellant was found guilty of burglary in the first degree, rape in the first degree, and sodomy in the first degree, for which he was sentenced to imprisonment for life as to the convictions for burglary and sodomy, to run concurrently with each other, and 150 years for the conviction of rape in the first degree, with such sentence to run consecutively to the sentence in the other two cases. This case had previously been before this Court, on appeal from judgments of conviction and sentence for first degree burglary and first degree rape; those judgments were based on defendant's plea of guilty pursuant to plea bargaining agreement made with the understanding that

the charge of sodomy would be nol-prossed. The judgments of conviction and sentence were reversed, *Smith v. State*, 494 So.2d 182 (Ala.Cr.App. 1986).

As the brief of counsel for appellee in the instant case adopts the statement of the case and the statement of the facts as found in brief of counsel for appellant, we quote from the brief of counsel for appellant the following, in which we omit the name and identity of the female victim so as to preclude unnecessary embarrassment to her (in the quotation hereinafter made we will refer to her merely as the victim):

> "This case concerns the alleged rape and sodomy, resulting from the burglary at the place of the alleged victim. She testified that in the early morning hours of September 14, 1985, . . . a man's head peeked around the bedroom door wearing a mask. The man closed the door behind him and approached the victim with a knife in his hand. The man was dressed in his underwear with a mask on his head. The man put his hand on the victim's mouth and told her not to scream.
>
> "The victim described the mask the man was wearing as a ski mask with the eyes, nose and mouth cut out, and described the knife as a small kitchen knife. She then testified that the assailant pulled her down on the bed, removed her panties and began to have sex with her. The assailant never removed the hood from his face. The assailant had sex with the victim in several different positions. During this, the assailant and the victim spoke. The victim testified there were more than four different acts of sex of sexual intercourse, including oral sex. The victim testified in each sexual act there was penetration.
>
> "The victim then testified that while the knife was usually in his hand during this period of time, he had at one time laid the knife on the bed and at one time

> placed the knife in her hands. At the time he brought the knife up to his chest and pulled her hand over the knife in the center and said, 'You've got the knife, go ahead and kill me.' The victim testified that 'she couldn't kill him.' She stated that she did not use the knife on him because she was afraid.
>
> "During the attack, the victim stated that she recognized the assailant's voice and she could recognize his eyes because he had real heavy eyebrows and his mouth and the way he was built. She stated that all she knew at the time was that she believed the attacker to be 'James', a boyfriend of an acquaintance of hers that lived nearby. The victim stated that she had an opportunity to hear the voice of James more than 25 times prior to the attack. The victim testified the attack took place over a period of time greater than an hour.
>
> "Following the attack, the victim called a police officer friend of hers, who reported the incident to the police. Investigator Renee Grimsley of the Montgomery Police Department arrived on the scene in response to this call. A short time later, the victim described to Officer Grimsley the attacker as a 'James' who lived in a house up the street with a girl friend. The victim did not know the last name of the person known as 'James'. Then Officer Hurst completed the incident or offense report. In this report, Hurst described the assailant as a black man in his twenties, with a height of 5' 6" tall and weight of 130 pounds. It provided no name, not even 'James'. It contained no response for address or probable destination of the assailant. Under the portion of the offense report requesting information with the questions 'can a suspect be named?' the box marked 'No or Unknown' was completed. Several days after the complaint, Investigators Grimsley and Faulkner began their investigation. On September 18, 1985, the officers approached an unknown subject raking grass or leaves and requested information as to whether he knew where a subject by the name of 'James' that

lived with ___ could be located. This subject told the officer that such a person was at Doby Motel on the Mobile Highway. The officers proceeded to this motel to contact this 'James'. At the motel, they found James Smith. They indicated they wanted to talk to him regarding the alleged incident involving the victim. The officers transported Smith to the Montgomery Police Department in a police car. Officer Grimsley then advised Smith of certain 'rights' and had Smith sign a 'rights form'. Smith indicated a willingness to answer questions at that time and denied any involvement with the incident. The officers then began to collect evidence from Mr. Smith including hair and saliva samples, as well as a blood sample. The officers then contacted the victim to come to the police headquarters for a voice lineup which Smith was to participate in. Smith participated in this lineup and the victim identified Smith's voice as that of the assailant. The officers then approached Smith and confronted him with the results of the voice lineup; . . . As a result of the voice lineup, the officers placed Smith under arrest with the charges of rape, burglary and sodomy. Officer Grimsley testified that up until the time following the voice lineup, Smith would have been free to go had he requested. These are the facts of the case upon which Smith appeals his conviction on a charge of burglary, rape and sodomy."

We now quote from the testimony of Officer Margaret Faulkner, a witness for the State:

"Q. Did you have an occasion to be called to a response of some form of assault alleged to have occurred on Hatton Avenue?

"A. Not on the 14th I wasn't. I did not get involved until the 18th.

"Q. Are you the partner of – were you at that time the partner of Officer Grimsley?

"A. Yes, I was.

"Q. And did you do anything with the case between the 14th and the 18th?

"A. No, I did not.

" . . .

"Q. What was your involvement on the 18th?

"A. We had talked with the victim and went back and canvassed the area of the assault, the apartment area where she lived in out there.

" . . .

"Q. Who did you speak to over there? Did you speak to anybody in particular?

"A. We spoke to the victim, and we spoke to a guy named – he was raking leaves. Wait a second and I will give you his name. A black male named Rene that was raking leaves out there at the apartment complex.

" . . .

"Q. Did you have an occasion later on the 18th to approach Mr. Smith who is seated right here? (Pointing to defendant).

"A. Yes, sir, I know him.

"Q. Where did you first meet Mr. Smith?

"A. At Doby's Motel.

" . . .

"Q. Did you suspect him or anything at that point?

"A. Yes, sir. He was a suspect.

"Q, Did you inform him that he was a suspect?

"A. Yes, sir.

"Q. And where did you take Mr. Smith?

"A. To Police Headquarters.

"Q. What did you do with Mr. Smith there?

"A. We read him his rights.

" . . .

"A. We informed him that we needed to talk with him in reference to a complaint of sexual assault and burglary that happened at his apartment complex, and that his name had come up in the investigation. That's exactly what we informed him.

"Q. And what did he say?

"A. He said he didn't know anything about it, but he would be glad to come down to headquarters and talk with us. We asked him if he would.

"Q. So when you went down to headquarters, did you ask him – again, this is prior to any tests or specimens being taken from him. Did you ask him again if he knew anything about after reading his rights?

"A. Yes, sir.

"Q. And what was his response then?

"A. He didn't know anything about it.

"Q. Now, did you participate in forming a voice identification lineup?

"A. Yes, sir, I did.

"Q. What was your participation in that?

"A. I was with [the alleged victim].

"Q. Did you assist her in picking the persons that participated in this lineup?

"A. Who, Rene Grimsley [another police officer]?

"Q. Yes, I'm sorry.

"A. Yes, I did.

"Q. Were you in the room while the voice identification lineup was taking place?

"A. What do you mean?

"Q. Well, after [the alleged victim] had identified somebody, were you in the room at that time?

"A. Yes, I was.

"Q. Tell me how the voice identification lineup was conducted?

"A. We had [the alleged victim] in Sgt. Ingram's office, there's a door adjoining Lt. – I mean, it's Lt. Ingram's office. And there is a door that adjoins the two offices that goes from one office to Lt. Gant's office. [the alleged victim] was in Sgt. Ingram's office sitting in a chair. We opened the door. We let each black male come in and read three sentences.

"Q. Are those the three black males that you believed participated in that voice lineup?

(referring to photographs).

"A. Yes, sir.

"Q. Did you tell the statements to each of the persons and then they repeated them back to you?

"A. The words? The sentences? Yes – no. We gave them a piece of paper that had what we wanted them to read back on them.

"Q. To all of the people?

"A. As they came in, one at a time.

"Q. So each of them read from a paper. Nobody repeated what anybody had to say?

"A. They read. There were three sentences that [the alleged victim] wanted – that she said she remembered this guy saying. And we wrote those sentences down on a piece of paper and gave them to each

black male as he entered the room and asked him to read those sentences.

"Q. So nobody said anything that you said, repeat after me? Nobody said anything like that?

"A. No. No, not that I recall.

"Q. I want you to do me a favor and let's read statement number one there. Read it to me in about the same tone or the same volume that you would have had those persons say it.

"A. We just asked him to read it. We didn't ask them to put any kind expression in it.

"Q. You observed it though?

"A. I heard it.

"Q. Can you tell me the type of volume that they used in reading it?

"A. Don't do that. Don't do that. Some was louder, some was softer, some was more verbal than others in it.

"Q. After that, did you tell Mr. Smith he had been identified in the voice lineup?

"A. I didn't; Investigator Grimsley did that.

"Q. Were you there when she did that?

"A. Yes, sir.

"Q. Did you participate in taking a statement from Mr. Smith?

"A. I was in the room, but I did not do any of the questioning.

"Q. You were in the room during the taking of the statement?

"A. Yes, sir.

"Q. Did you help coach Mr. Smith at all?

"A. What do you mean by coaching?

"Q. If he had difficulty with an answer, did you maybe help provide him with an answer?

"A. No, sir.

"Q. Did Officer Grimsley maybe help provide him with an answer to?

"A. I don't know waht you mean exactly by help providing. We asked questions and he answered.

"Q. Well, if he didn't know something, did you kind of mouth something to him or help him with an answer?

"A. We might have explained our question, but as far as coaching him in an answer, no, we didn't.

"Q. Were you present when the typed statement was prepared?

"A. I was present when we got it back; yes.

"Q. Did you allow Mr. Smith to go over the typed statement?

"A. I don't think I did. I don't recall.

"Q. Did you allow Mr. Smith to read the typed statement and sign it?

"A. No, sir."

The following are the issues raised on this appeal, which we will hereinafter consider in the order raised in brief of counsel for appellant:

I. WAS THE INVESTIGATORY PICKUP OF SMITH BY THE POLICE OFFICERS ON SEPTEMBER 18, 1985, AN UNLAWFUL ARREST AS IT WAS NOT SUPPORTED BY PROBABLE CAUSE?

"II. DID THE TRIAL COURT COMMIT ERROR BY ADMITTING THE STATEMENT OF THE DEFENDANT INTO EVIDENCE?

"III. DID THE TRIAL COURT COMMIT REVERSIBLE ERROR BY REFUSING TO RECUSE ITSELF FROM THIS CASE?

"IV. WAS THE SENTENCE IMPOSED BY THE TRIAL COURT IN THIS CASE AN UNLAWFUL SENTENCE UNDER THE LAW, OR IN VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS?

I.

In the brief of counsel for appellant as to this issue, it is stated:

"Since such an arrest is illegal, it has been held that the confession obtained through a custodial interrogation following an illegal arrest should be excluded, unless intervening events break the causal connection between the arrest and the confession so the confession is sufficiently an act of free will to purge the primary taint. *Taylor v. Alabama,* 457 U.S. 687 (1982).

"As a result of apparent information given by [the victim] that her assailant might be a man named 'James' who lived with a friend named ___ (despite her signed statement on the date of the offense that no name for the assailant was known), Officers Grimsley and Faulkner proceeded to canvass the area in search of this person. The officers contacted an unnamed and apparently unknown person who referred them to Doby's Motel to find a 'James' living with a ___. There was no testimony or evidence presented at trial as to the identity or credibility of this source. The officers approached James Smith at Doby's Motel and asked him to accompany them downtown for investigatory questioning. Officer Grimsley testified that Mr. Smith was free to go at any time during the period of interrogation prior to the voice lineup (R-190). For this interrogation, the

Defendant was brought to a room in police headquarters, the door was often shut, and possibly locked, Mr. Smith was questioned regarding the incident throughout the period of time he was in this room, hair pullings were taken from Mr. Smith, saliva samples were taken as well as blood drawn from Mr. Smith. To the question asked of Officer Grimsley, 'Why didn't you just question him at Doby's?', she responded, We don't handle investigations that way. We take people back to our office to talk to them.' As a result of this arrest, the police officers obtained a confession from Mr. Smith as well as samples for physical evidence and a voice lineup identification by the victim.

"The record is clear that the officers did not have probable cause to arrest Mr. Smith at that time. The officers' information at that time was limited to a first name, no known street address, the first name of someone with whom he was alleged to have lived with, and information provided by an unknown source of unknown credibility. The information which led the officers to focus their attention on James Smith was provided not by the victim in this case, but rather by the individual raking leaves. Accordingly, at the time of the pickup of a James Lewis Smith by Officers Grimsley and Faulkner, they might have had reasonable suspicion to question briefly James Lewis Smith; however, they clearly did not have probable cause to arrest Mr. Smith. The elements of the *Dunaway* case apply to this case: Smith was taken from the scene in a police car, was placed in a room for interrogation, and was not told he was free to go. Therefore, the 'investigatory' taking into custody of Mr. Smith was an unreasonable seizure in violation of Smith's constitutional rights as delineated in the *Dunaway* and *Taylor* decisions noted above.

"The taint of the illegal arrest was not purged by the circumstances of this case. In determining whether the confession has been purged of the taint of the

illegal arrest, the factors to be considered include the temporaral proximity of arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of official misconduct. *Taylor v. Alabama, supra.* In the *Taylor* case, the illegal arrest was not cured by the fact that six hours had elapsed between the arrest and the confession; in the case at bar more than 4 and 1/2 hours has elapsed. In the *Taylor* case, the illegality of the arrest was not cured by the fact that Miranda warnings were given before the confession; in the case ar bar possible Miranda warnings were given only once, and even then several hours prior to the confession, thus no cure through those warnings. It can certainly be argued that the police contact was purposeful and a flagrant attempt to strengthen their case by gathering evidence from Mr. Smith prior to an arrest. The police officers knew fully well that following arrest, Smith might well be less inclined to cooperate with the officers. This conduct can be shown by the police officers' refusal to permit Mr. Smith to review his confession after it had been typed. This denial prevent Mr. Smith from recanting this confession once the pressure of the moment had passed. Therefore, applying the factors listed, it is clear that the investigation conducted by the officers upon Mr. Smith was in fact a warrantless arrest unsupported by probable cause; accordingly, none of the decisions cited, the evidence obtained as a result of this action and which had not been cured of its taint should have been excluded. Therefore, it was an error for the trial court to admit this evidence; the conviction of the defendant should therefore be reversed and remanded with instructions to the trial court to grant the defendant a new trial and to exclude all evidence resulting from this illegal arrest."

We do not agree with the position taken by counsel for appellant as stated above. Although the law enforcement officers succeeded in their effort to obtain confessions from the defendant as to the burglary, sodomy by force, and rape of the alleged victim by their conversations with the defendant, they had otherwise obtained sufficient evidence from the victim herself that justified their arrest of the defendant.

II.

For reasons stated under Issue I above, we determine that the trial court did not commit error by admitting the statement of the defendant into evidence, as contended by Issue II raised by appellant's attorney.

III.

Although counsel for appellant makes a strong argument in his brief in favor of the issue that the trial judge committed reversible error in refusing to recuse himself from the trial of the case now on appeal, he fails to cite any authority which supports appellant's position as to this issue and we are not convinced that the issue should be decided favorably to appellant.

IV.

We do not agree with all of the contentions of counsel for appellant as to this issue, but we are of the opinion that he is correct as to the contention made in his brief as follows:

"the sentence of 150 years on a charge of Rape I is in violation of the *Code of Alabama*, 1975. Smith was sentenced to 150 years on his conviction of rape in the first degree. The *Code of Alabama 1975*, § 13A-5-6(a)(1) states that the term of imprisonment for a Class A felony is limited to a time of life or not more than 99 years nor less than 10 years. Further, § 13A-5-6(a)(4) provides that for a Class A felony in which a deadly weapon was used the term of imprisonment is to be not less than twenty years. This Section was invoked by the State at the time of sentencing. The decision of *Smith v. State*, 447 So.2d 1327 Ala.Cr.App. 1983), affirmed, 447 So.2d 1334 (Ala. 1984), states the Code Section is to be construed as a whole and therefore it is clear that the maximum times are in fact supplied by subsection (a)(1), described above; accordingly, the maximum term for sentencing pursuant to § 13A-5-6 for a Class A felony where a deadly weapon is used is for life or not more than 99 years. Therefore, the sentence of 150 years was unlawful."

It is our opinion that the judgments of conviction should be affirmed, but that the judgment of sentence to imprisonment for 150 years is not correct and that the case should be remanded for proper sentencing on the rape charge. Adequate notice should be given to the parties of the time and place of the sentencing hearing, and the trial court will make return to this order of remand with notice thereof to the parties; either party aggrieved thereby will have the right within fourteen days to file a brief in support of the position taken by said party and the opposing party will have seven days thereafter in which to file a reply brief.

The foregoing opinion was prepared by Retired Circuit Judge Leigh M. Clark, serving as a judge of this

Court under the provisions of § 6.10 of the Judicial Article (Constitutional Amendment No. 328); his opinion is hereby adopted as that of this Court.

CONVICTIONS AFFIRMED; SENTENCES FOR BURGLARY AND SODOMY AFFIRMED; REMANDED FOR RESENTENCING ON THE RAPE CONVICTION.

ALL JUDGES CONCUR.

THE STATE OF ALABAMA – JUDICIAL DEPARTMENT

THE COURT OF CRIMINAL APPEALS OF ALABAMA

3rd *Div., No.* 574

JAMES LEWIS SMITH, *Appellant,*

v.

THE STATE, *Appellee,*

From MONTGOMERY *Circuit Court*

The State of Alabama,)
City and County of Montgomery.)

I, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, do hereby certify that the foregoing pages numbered from one to eleven *inclusive, contain a full, true and correct copy of the opinion of said Court of Criminal Appeals in the above stated cause, as the same appears and remains of record and on file in this office.*

Witness, Mollie Jordan, Clerk of the Court of Criminal Appeals of Alabama, at the Capitol this the 26th *day of* May, 1987.

/s/ Mollie Jordan
Clerk of the Court of Criminal Appeals of Alabama.

Alabama Supreme Court Opinion
Affirming the Conviction but
Remanding for Re-sentencing

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA
OCTOBER TERM, 1987-88

Ex parte James Lewis Smith

86-1448

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: James Lewis Smith
v.
State of Alabama)

JONES, JUSTICE.

The petitioner was arrested and indicted on charges of rape, burglary, and sodomy, all arising out of the same alleged incident. As a result of a plea bargain agreement, the sodomy charge was nol-prossed and the petitioner pleaded guilty to the charges of first degree rape and first degree burglary. After a sentencing hearing, the petitioner was sentenced to 30 years on each conviction, the sentences to run concurrently.

Subsequently, the petitioner filed a motion seeking to withdraw his guilty pleas, claiming that he did not enter the guilty pleas knowingly or voluntarily. The trial court denied this motion. The Court of Criminal Appeals, however, found that the petitioner had not been properly informed of the potential sentences before pleading guilty, reversed the conviction and sentences, and

remanded the cause to the trial court. *Smith v. State*, 494 So.2d 182 (Ala.Cr.App. 1986).

The State then moved to reinstate the charge of first degree sodomy. On remand, the case was reassigned to the same trial judge, and he granted the State's motion to reinstate the original indictment. After a hearing on a number of defense motions, trial was conducted on the merits of the case. The jury returned a verdict of guilty on all three counts. After a sentencing hearing, the petitioner was sentenced to life imprisonment for the conviction of first degree sodomy, which term was to run concurrently with a life term for the first degree burglary conviction. The petitioner was also sentenced to a term of 150 years for the conviction of first degree rape, that sentence to run consecutively to the other two sentences. The Court of Criminal Appeals affirmed the conviction, affirmed the life sentences for the sodomy and burglary convictions, and remanded to the trial court for resentencing on the rape conviction.

We granted the defendant's request for review of the Court of Criminal Appeals' judgment affirming the judgment of sentence that enhanced the petitioner's sentence for burglary from 30 years to life imprisonment. The 150-year sentence for rape and the life sentence for sodomy are not before us for review. We reverse and remand as to the enhanced sentence for burglary.

In the resentencing of the petitioner after remand and conviction, the trial court stated:

> "The court finds that since I did not hear all the testimony during your plea and now at trial have heard all the testimony. . . ., the court finds that it's proper to increase the [burglary] sentence beyond that which was given you on the plea bargain."

It is clear that the trial judge increased the petitioner's sentence because of his subjective observations and not because of any objective evidence of events subsequent to the petitioner's first conviction. We adopt the language from *Rice v. Simpson*, 274 F.Supp. 116 (M.D.Ala. 1967), affirmed, 396 F.2d 499 (5th Cir. 1968), affirmed sub nom. *North Carolina v. Pearce*, 395 U.S. 711 (1969), as the applicable rule in Alabama:

> "[T]here can be no increase in a sentence in a criminal case after the sentence is imposed. . . . To deny such protection to convicted criminals who elect to exercise their post-conviction remedies and do so successfully is unfair discrimination and does nothing except to serve to limit the use of post-conviction proceedings in the Alabama state courts by prisoners. It denies the prisoner the protection of his original sentence as a condition to the right of his appealing his conviction or exercising his post-conviction remedies."

274 F.Supp. at 122. See, also, *Ex parte Tice*, 475 So.2d 590 (Ala. 1984).

In support of the affirmance of the petitioner's enhanced sentence in the burglary conviction, the State quotes the following language from *North Carolina v. Pearce*, 395 U.S. 711 (1969):

> "A trial judge is not constitutionally precluded . . . from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.' *Williams v. New York*, 337 U.S. 241, 245. Such information may come to the judge's attention from evidence

> adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, or possibly from other sources. The freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in *Williams v. New York, supra*, that a state may adopt the prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime. *Id.*, at 247."

395 U.S. at 723.

The State's reliance on *Pearce* is misplaced. Indeed, in unmistakable terms, the holding in *Pearce* makes it abundantly clear that the authorization for an enhanced resentencing "in the light of events subsequent to the first trial" is an exception to the general rule that, absent such evidence, a sentence imposed at the first trial may not be enhanced upon reconviction at the second trial after the first conviction was been overturned on appeal and remanded for a new trial.

REVERSED AND REMANDED.

Torbert, C.J., and Almon, Shores, Houston, and Steagall, JJ., concur.

Maddox, Beatty, and Adams, JJ., dissent.

Ex parte James Lewis Smith

MADDOX, JUSTICE (Dissenting)

I do not believe that the trial court erred in enhancing the petitioner's sentence. In some respects, this case is similar to *Wesley v. State*, 481 So.2d 1155 (Ala.Cr.App. 1985), reversed and remanded, 481 So.2d 1162 (Ala. 1985), on remand, 481 So.2d 1163 (Ala.Cr.App. 1985). In that

case, Wesley was indicted for robbery in the first degree, and that indictment was amended to charge attempted robbery. He pleaded guilty to that charge, but his plea was set aside on appeal because the general attempt statute was no longer applicable to robbery offenses. *Wesley v. State*, 448 So.2d 468 (Ala.Cr.App. 1984). Wesley was retried on the same indictment, but for robbery in the first degree, and the Court of Criminal Appeals affirmed his conviction on that charge. This Court reversed that decision of the Court of Criminal Appeals, saying: "It follows that when the State of Alabama chose to try petitioner again on the void amended indictment, his conviction was erroneous. However, as stated in *Wesley, supra*, the State of Alabama is free to *reindict* petitioner for the appropriate offense. *Williams v. State*, 333 So.2d 613 (Ala. 1976)." *Ex parte Wesley*, 481 So.2d 1162, 1163 (Ala. 1985) (emphasis added). Implicit in this holding is the idea that Wesley could receive a higher sentence than was imposed when he pleaded guilty, because he could be retried for robbery I.

Furthermore, charge and sentence concessions can be made when an accused voluntarily enters a plea of guilty, and the principles of *North Carolina v. Pearce*, 395 U.S. 711 (1969), would not apply. Instead, the principles of *Brady v. United States*, 397 U.S. 742 (1970), would apply. The Supreme Court of the United States held in *Brady* that sentence concessions may be made constitutionally when persons plead guilty. the Court held:

> "Brady's claim is of a different sort: that it violates the Fifth Amendment to influence or encourage a guilt plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime

charged if a conviction is obtained after the State is put to its proof.

" . . . We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

" . . . For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious – his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages – the more promptly imposed punishment after an admission of guilty may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof. . . .

" . . . But we cannot hold that it is unconstitutional for the state to extend a benefit to a defendant who in turn extends a substantial benefit to the State. . . ."

397 U.S. at 750-53.

Standard 14-1.8. of the American Bar Association Standards for Criminal Justice provides:

"(a) The fact that a defendant has entered a plea of guilty or nolo contendere should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence. It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty of nolo contendere when consistent with the protection of the public, the

gravity of the offense, and the needs of the defendant, and when there is substantial evidence to establish that:

"(i) the defendant is genuinely contrite and has shown a willingness to assume responsibility for his or her conduct;

"(ii) the concessions will make possible alternative correctional measures which are better adapted to achieving protective, deterrent, or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction;

"(iii) the defendant, by making public trial unnecessary, has demonstrated genuine consideration for the victims of his or her criminal activity, by desiring either to make restitution or to prevent unseemly public scrutiny or embarrassment to them; or

(iv) the defendant has given or offered cooperation when such cooperation has resulted or may result in the successful prosecution of other offenders engaged in equally serious or more serious criminal conduct.

"(b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere."

In this case, petitioner successfully attacked his guilty plea on the basis that the maximum possible sentence was not explained to him; his plea was not, therefore, knowingly and intelligently given.

It would appear to me that a petitioner should not be allowed to receive sentence concessions in return for a

guilty plea and then, after a successful attack on that plea, bind the State to its original sentencing bargain if he is later convicted after a trial. Thus, a petitioner could go to trial and chance an acquittal knowing he could receive a sentence no harsher than he was originally given.

The facts of this case are dissimilar to *North Carolina v. Pearce*, in my opinion, and I would affirm the judgment of the Court of Criminal Appeals; consequently, I must respectfully dissent.

Adams, J., concurs.

Alabama Supreme Court Opinion and Dissent Denying Petitioner's Rehearing

On Application for Rehearing

JONES, JUSTICE.

APPLICATION FOR REHEARING OVERRULED.

Almon, Shores, Houston, and Steagall, JJ., concur.

Torbert, C. J., and Maddox, Beatty, and Adams, JJ., dissent.

Ex parte James Lewis Smith

MADDOX, JUSTICE (Dissenting from denial of rehearing).

The majority denies the State's application for rehearing without comment, apparently on the ground that the State has presented nothing new for the Court to review. I believe the State has shown in its brief why the case of *North Carolina v. Pearce*, 395 U.S. 711 (1969), is not applicable here. Because the majority fails to distinguish cases cited in the State's brief that indicate to me that we should grant rehearing in this case, I take this opportunity to extend the dissent which I filed on original deliverance. In my opinion, the Supreme Court of the United States has refused to broaden the scope of *Pearce*, especially in fact situations such as that presented here.

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the defendant, with counsel, and the prosecutor, entered into plea negotiations whereby the prosecutor offered to recommend a five-year sentence if the defendant would

plead guilty as charged to uttering a forged instrument. The prosecutor told the defendant that if he did not plead and save the court the inconvenience and necessity of a trial, he would return to the grand jury and seek an indictment under the habitual offender law, subjecting the defendant to a mandatory sentence of life imprisonment. The defendant rejected the offer, and the prosecutor obtained an indictment charging him under the habitual offender law. The defendant was subsequently tried and convicted and sentenced to life imprisonment. The defendant then challenged the prosecutor's actions, claiming it was an impairment of his constitutional rights to a trial. *Id.* at 359. The Supreme Court found *Pearce* to be distinguishable. In *Pearce*, the State unilaterally imposed a penalty upon a defendant who had chosen to exercise his right to appeal his original conviction. The Court found this was a situation "very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power." *Id.* at 362. The Court further stated:

> "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' . . . But in the 'give-and-take' of plea bargaining, there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer.
>
> Plea bargaining flows from 'the mutuality of advantage' to defendants and prosecutors, each with his own reasons for wanting to avoid trial."

Id. at 363 (citations omitted).

The Court found the prosecutor's action to be constitutional, stating that a "rigid constitutional rule" prohibiting a prosecutor from acting forthrightly in his dealings with the defense "could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged." *Id.* at 365.

Although *Bordenkircher* dealt with prosecutorial vindictiveness rather than judicial vindictiveness, its reasoning is persuasive in the instant case. Here, as in *Bordenkircher*, the petitioner was given the option of either accepting the plea bargain or insisting upon trial. Further, just as the defendant in *Bordenkircher* was aware of the consequences of rejecting the prosecutor's offer of a plea bargain, the petitioner in this case was aware of the consequences of setting aside the plea bargain. The supplemental transcript indicates that the petitioner was aware that the sodomy charge was *nol-prossed* only because of his guilty plea. Additionally, he was aware that the maximum sentence he could receive for burglary I was life imprisonment and that that was the maximum sentence for rape I as well. As is the custom where a court sentences an accused following a guilty plea, the court in this case displayed leniency in sentencing the petitioner to concurrent sentences of 30 years for burglary I and rape I. However, petitioner chose to forgo this leniency, and by appealing his conviction, withdrew his plea, thus tacitly repudiating his plea bargain agreement. See *Moore v. Foti*, 546 F.2d 67 (5th Cir. 1977). Thus, petitioner chose to subject himself to the possibility of receiving life sentences for rape I and burglary I if convicted

and having reinstated the sodomy I charge with its maximum sentence of life imprisonment.

The Supreme Court of the United States further narrowed the scope of *Pearce* in *United States v. Goodwin*, 457 U.S. 368 (1982), and *Ricketts v. Adamson*, ___ U.S. ___, 107 S.Ct. 2680 (1987). In *Goodwin*, the Court did not find prosecutorial vindictiveness where the prosecutor charged a misdemeanor defendant with a felony after he made a demand for a jury trial. In *Ricketts*, the defendant was allowed to plead guilty to second degree murder in exchange for his testimony against several co-defendants. Subsequently, the defendant repudiated the agreement by refusing to testify at the co-defendants' retrial. The prosecutor reinstated the original first degree murder charge against the defendant. The defendant was tried, convicted, and sentenced to death. The Supreme Court upheld the conviction finding that the defendant had chosen to face the possibility of the death penalty by repudiating the plea agreement. *Id.* ___ U.S. at ___, 107 S.Ct. at 2686.

The Fifth Circuit Court of Appeals also has applied the analysis of *Pearce* and *Bordenkircher* to instances of alleged prosecutorial vindictiveness, and that court has also applied this reasoning to the analogous issue of judicial vindictiveness.

In *Foti*, supra, the defendant sought habeas corpus relief in federal court to stop the State from reinstating first degree murder charges against him. The defendant, a juvenile, was initially charged with first degree murder

but pleaded guilty to murder in the second degree pursuant to a plea bargain. However, the defendant successfully challenged his conviction in the appellate courts, and upon remand the State reinstituted the first degree murder charge. In his federal habeas corpus petition, the defendant asserted that this action placed him in double jeopardy. The Fifth Circuit rejected this argument and stated that the defendant's successful challenge to his plea bargained sentence was a "tacit repudiation of the bargain, allowing the government to prosecute him on the greater charge." 546 F.2d at 68.

Although *Foti* dealt with double jeopardy issues, its reasoning is useful in the instant case. Like the defendant in *Foti*, the petitioner in this case successfully challenged his plea bargained conviction and sentence because he was obviously unsatisfied with the sentence initially imposed. *Foti* held that in such an instance, the defendant's action is a "tacit repudiation" of the plea bargain agreement and he must face the consequences of his decision.

Like the defendant in *Foti*, the petitioner in this case repudiated the plea agreement. By this action, he not only permitted the State to reinstitute the sodomy I charge, but also permitted the trial court to enhance his sentence, because the sentence initially imposed was at least partly the result of leniency shown because he did not inconvenience the court and cause embarrassment to the victim when he chose to plead guilty to the charges rather than to stand trial.

In *Frank v. Blackburn*, 646 F.2d 873 (5th Cir. 1980), the analysis of *Bordenkircher* was applied to the issue of judicial vindictiveness. In *Frank*, the defendant attacked his sentence on the ground that the trial judge impermissibly increased his sentence because he rejected a plea bargain offer and elected to stand trial. The trial court offered a 20-year sentence if the defendant would plead guilty to the charge, but the defendant opted to stand trial. Upon conviction, he was sentenced to 33 years. The federal district court denied habeas corpus relief, but a three-judge panel of the Fifth Circuit reversed, finding that the defendant was penalized by the state court because he exercised his right to stand trial. The court later decided to rehear the case en banc "because of its potentially devastating impact upon the plea bargaining process." 646 F.2d at 875. A majority of the en banc court found that no constitutional rights were violated in the conviction and sentencing of the defendant.

In reaching its decision, the court noted the advantages of the plea bargaining process, which it found to expedite justice and to conserve judicial resources. 646 F.2d at 878. The court agreed with the defendant's assertion that a person cannot be punished simply for exercising his constitutional right to stand trial, but the court did not agree that the mere imposition of a longer sentence than defendant would have received had he pleaded guilty automatically constitutes such punishment. *Id.* at 883. A defendant is free to accept or reject the offer of the State. Once it is rejected, however, the defendant cannot complain that the denial of the benefits of the offer he rejected constitutes punishment or evidences judicial vindictiveness. "To accept such an argument is to

ignore completely the underlying philosophy and purpose of the plea bargaining system. If a defendant can successfully demand the same leniency after standing trial that was offered to him prior to trial in exchange for a guilty plea, all the incentives to plea bargain disappear; the defendant has nothing to lose by going to trial." *Id.* at 883.

Alabama Court of Criminal
Appeals Opinion on Remand
From Alabama Supreme Court

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS
OCTOBER TERM, 1988-89

3 Div. 574

James Lewis Smith

v.

State

Appeal from Montgomery Circuit Court

After Remand from the Alabama Supreme Court

McMILLAN, JUDGE

Pursuant to the Alabama Supreme Court's decision in *Ex parte Smith*, [Ms. 86-1448, April 8, 1988] ___ So.2d ___ (Ala. 1988), this cause is due to be remanded for resentencing.

REMANDED FOR PROPER SENTENCING.

ALL JUDGES CONCUR.

Order Staying Remand Pending
Outcome In This Court

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

3 Div. 574

James L. Smith

vs.

State of Alabama

Appeal from Montgomery Circuit Court No. CC85-1682-PR,
No. CC85-1683-PR and No. CC85-1684-PR

It is ordered, on motion of appellee, that this cause be and the same is hereby stayed pending decision of the United States Supreme Court on appellee's petion for writ of certiorari filed in that Court.

WITNESS, Mollie Jordan, Clerk of the Court of Criminal Appeals, this 31st day of January, 1989.

/s/ Mollie Jordan
CLERK
COURT OF CRIMINAL APPEALS
OF ALABAMA

Supreme Court, U.S.
FILED
FEB 23 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-333

In The

Supreme Court of the United States

October Term, 1988

STATE OF ALABAMA,

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

BRIEF OF PETITIONER

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QUESTIONS PRESENTED

I. Whether the presumption of vindictiveness established in *North Carolina v. Pearce*, 395 U.S. 711 (1969), applies when a defendant's guilty plea is withdrawn and, after a jury trial, he receives a greater sentence than he would have under the withdrawn guilty plea?

II. Whether the Alabama Supreme Court erred in holding that the enhancement of a defendant's sentence following a retrial upon withdrawal of a guilty plea can only be based on conduct occuring after the original sentence and not upon facts concerning the crime that were elucidated at the retrial?

PARTIES

The caption contains the names of all parties to the proceedings in the courts below.

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OPINIONS BELOW

1. The opinion of the Supreme Court of Alabama reversing respondent's conviction is not yet reported but is reproduced in the joint appendix at p. 107.

2. The Alabama Supreme Court's opinion and dissent denying Petitioner's application for rehearing is not yet reported but is reproduced in the joint appendix at p. 115.

3. The opinion of the Alabama Court of Criminal Appeals reversing Respondent's guilty plea and sentence is reported as *Smith v. State*, 494 So.2d 182 (Ala. Cr. App. 1986) and is reproduced in the joint appendix at p. 64.

JURISDICTION

The judgment of the Alabama Supreme Court which is sought to be reviewed was rendered on April 8, 1988 and rehearing was denied on June 24, 1988. The petition for certiorari was mailed on August 23, 1988 and this Court granted said petition on January 9, 1989.

This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment XIV (in pertinent part) " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

The Respondent, James Lewis Smith, was charged with rape, sodomy, and burglary all in the first degree. On January 6, 1986, the Respondent entered into a plea agreement in which he agreed to plead guilty to burglary and rape both in the first degree in exchange for the State's dismissing the first degree sodomy charge. (J.A. 3-24) The State made no recommendation concerning Smith's sentence. The trial court dismissed the sodomy charge upon the State's motion and accepted the Respondent's guilty plea and sentenced him to thirty (30) years on each charge to be served concurrently (J.A. 23-24)

Subsequently, Smith moved to withdraw his guilty plea. (J.A. 47) The motion was denied by the trial court (J.A. 58) and Smith appealed to the Alabama Court of Criminal Appeals, which held that the trial court erred in accepting Smith's plea since he was not apprised of the fact that he was to be sentenced under the Alabama recidivist statute. (J.A. 64)

On remand, the case was assigned to the trial judge who accepted Smith's plea. The first degree sodomy charge was reinstated. (R. 426) On August 18, 1986, the Respondent was tried by a jury and convicted on all three charges.

On August 22, 1986, the Respondent appeared before the Court for sentencing.

The prosecutor moved to invoke the Alabama recidivist statute (because of its mandatory nature) (§ 13A-5-9, *Code of Alabama* 1975) and proved to the court's satisfaction that Smith had one prior felony conviction. (J.A.

80-81) The court also applied state law which required a minimum of a twenty year sentence. (§ 13A-5-6(A)(4), *Code of Alabama* 1975) (J.A. 81) Following this discussion, the court made the following comments:

> THE COURT: You had a trial and were convicted of rape, burglary and sodomy in the first degree. When you entered your plea, you told me your side of the story. And of course, now that the court has had a trial and heard all of the evidence – and the court by no means would increase your punishment beyond thirty years for rape and burglary on the fact that you were successful on your appeal because this court doesn't get into punishing or attempting to punish people for exercising all of their constitutional rights which is to appeal from a conviction or plea, or to have a trial if you so desire. There is nothing this court does which should be viewed as punishment for a successful appeal. I hope we all understand that. But under North Carolina versus Pearce, 395, U.S. 711; 23, L. Ed., 656; 89 S. Ct., 2072, the court finds that since I did not hear all of the testimony during your plea and now at trial have heard all of the testimony which consisted of raping the victim at least five times, and after the second or third time, then causing her to perform oral sex on you, and then of course, you performing oral sex on her, and then of course, at least raping her one or two more times after that, threatening her life with the knife and all, after looking at this matter, and your mental outlook on it and your position during the trial and what you said, the court finds that it's proper to increase the sentence beyond that which was given to you on the plea bargain.[1]

---

[1] The court sentenced Respondent to concurrent life sentences for the burglary and sodomy charges and to one hundred and fifty (150) years on the rape charge.

On August 29, 1986, at a hearing on Smith's motion for new trial, Smith's attorney asserted that Smith's sentence was excessive. (R. 409) Specifically, counsel argued:

> And finally, we feel like the sentence was excessive. Based on the case law the trial court quoted to us at sentencing, we interpret that case law to say that it's not based on testimony heard within the case that can reflect an increase of sentence, but based on facts which are heard or about events that take place prior to trial after the initial crime has been committed that warrants an increase in the sentence, not the substantive issues of the case.
>
> THE COURT: Well, between the first trial and the second trial, the events became apparent.
>
> MR. CASON: Yes.
>
> THE COURT: That's when he wrote the court and admitted that he raped the woman.
>
> MR. CASON: Right. Which we feel goes to the substantive issues involved in the case. We contend that that case law goes to – the increase of sentence goes to material things that occur after the initial crime has been committed.
>
> THE COURT: Well, one of the material things was that –
>
> MR. CASON: That would aggregate the circumstances, obviously, to listen to the victim when the court took the plea given the facts to accept the plea bargain that was reversed.
>
> THE COURT: The court had no knowledge that he raped the woman five times, and he didn't contradict that. He sodomized her twice by him performing oral sex on her and then he on her, with the children across the hall, with the knife basically at her throat at all times except when he so-called put it in her hand and pointed it towards him and said do to me

> what you want to do at 1:00 or 2:00 a.m. with a ski mask on, who has gotten through the window as shown with the screen being missing, and that was not – the court was not aware of that at the plea. I feel like perhaps the sentence may not have been harsh enough.
>
> MR. CASON: Yes, sir.
>
> THE COURT: All right.

(R. 409-411)

SUMMARY OF THE ARGUMENT

I.

Pearce's presumption of vindictiveness should not apply when the original sentence was imposed after a plea agreement was negotiated and thus the trial court was without full knowledge of the defendant's actions and of the facts of the crime itself. Since there is a conflict among the circuits, this Court should follow the Fifth Circuit's rationale in *Frank v. Blackburn*, 646 F.2d 873 (5th Cir. 1980) and the Eleventh Circuit's rationale in *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir. 1985).

II.

If this Court engages the presumption of vindictiveness, it should find that the presumption was amply rebutted by the explanation of the trial court. The trial court explained that upon imposing the initial sentence, it was unaware of the seriousness of the offense but that it learned the true flavor of the offense from the testimony

at trial. For this reason, the trial court enhanced Respondent's burglary sentence from thirty years to life imprisonment under its interpretation of *North Carolina v. Pearce*. The Alabama Supreme Court, following the literal language of *Pearce*, found, however, that a sentence can only be enhanced for facts occurring after the original sentence. This position is erroneous under this Court's opinions of *United States v. Wasman* and *Texas v. McCullough* which refused to embrace this limitation and which permit a trial court to consider facts elucidated at trial in enhancing a defendant's sentence.

ARGUMENT

I.

PEARCE'S PRESUMPTION OF VINDICTIVENESS SHOULD NOT APPLY TO ENHANCED SENTENCES FOLLOWING A REPUDIATED PLEA AGREEMENT.

In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court held that the Due Process Clause of the Fourteenth Amendment ordinarily prevents a sentencing judge from enhancing a defendant's sentence after he has successfully obtained appellate review of his conviction and sentence. The evil sought to be prevented is judicial vindictiveness or the apprehension of such vindictiveness. However, this Court stopped short of ruling that the Due Process Clause always prevents a judge from enhancing a previous sentence. *Id.* at 726. Due Process is offended only by situations which pose a realistic likelihood of vindictiveness. *Blackledge v. Perry*, 417 U.S. 21 (1974); *Thigpen v. Roberts*, 468 U.S. 27 (1984). This Court's

case law has established a presumption of vindictiveness when a sentence is enhanced after a successful appeal. *Texas v. McCullough*, 475 U.S. 134 (1986). However, this Court's jurisprudence has also established that in situations where there is no realistic likelihood of vindictiveness the *Pearce* presumption does not apply. *Colten v. Kentucky*, 407 U.S. 104 (1972). ("The possibility of vindictiveness, found to exist in *Pearce*, is not inherent in the Kentucky two-tier system.", *Id.* at 116); *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) (stiffer sentence imposed by a different jury, after a successful appeal, does not offend due process).

In *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the defendant refused the prosecutor's offer of a five year sentence in exchange for a guilty plea. The prosecutor threatened to seek an indictment invoking Kentucky's habitual offender statute if the defendant did not accept the plea bargain. When the defendant refused to plead, the prosecutor carried out his threat and obtained the new indictment. This Court refused to extend the *Pearce* analysis into the plea bargaining process. Thus, in *Bordenkircher* the due process clause was not violated when the prosecutor carried out his threat to increase the charge if the defendant insisted on a trial. See also: *United States v. Goodwin*, 457 U.S. 368 (1982); *Ricketts v. Adamson*, ___ U.S. ___, 107 S.Ct. 2680 (1987). While *Bordenkircher* and *Goodwin* were concerned with the possibility of prosecutorial vindictiveness and this case involves an allegation of judicial vindictiveness, they are instructive because they involve decisions based on the outcome of plea negotiations. Simply stated, Petitioners are asking

this Court to hold that *Pearce's* presumption of vindictiveness should not apply when a judge enhances a defendant's sentence when the original sentence was entered after the defendant negotiated a plea and entered a guilty plea and the enhanced sentence was entered after a full trial.

The Fifth and Eleventh Circuits have dealt with the present fact situation in two en banc cases: (1) *Frank v. Blackburn*, 646 F.2d 873 (5th Cir. 1980) and (2) *Hitchcock v. Wainwright*, 770 F.2d 1514, 1518-1519 (11th Cir. 1985).

The facts in *Frank* are as follows:

> Once before the trial and once during a recess in the prosecution's case, the trial judge conducted a plea bargaining session in his chambers. Both the prosecutor and defense counsel participated in these sessions. On both occasions the judge, in response to a request from defense counsel, personally stated that he would sentence Frank to a period of twenty years confinement in return for a plea of guilty. Frank rejected both offers, stood trial, and was convicted by the jury, whereupon the judge imposed a sentence of thirty-three years in prison.

Frank, 646 F.2d at 875. On appeal Frank, attacked the sentence on the ". . . ground that the trial judge impermissibly increased the term of confinement because Frank rejected a plea bargain offer and elected to stand trial." *Id.* After a thorough discussion of plea bargaining in general, the court wrote:

> We agree wholeheartedly with Frank's assertion that a defendant cannot be punished *simply* for exercising his constitutional right to stand trial. We do not agree, however, that the mere imposition of a longer sentence than defendant would have received had he pleaded guilty automatically constitutes such punishment. The Supreme Court's plea bargaining decisions make it clear that a state is free to encourage guilty pleas by offering substantial benefits to a defendant, or by threatening an accused with more severe punishment should a negotiated plea be refused. It is equally clear that a defendant is free to accept or reject the "bargain" offered by the state. *Once the bargain – whether it be reduced charges, a recommended sentence, or some other concession – is rejected, however, the defendant cannot complain that the denial of the rejected offer constitutes a punishment or is evidence of judicial vindictiveness. To accept such an argument is to ignore completely the underlying philosophy and purposes of the plea bargaining system. If a defendant can successfully demand the same leniency after standing trial that was offered to him prior to trial in exchange for a guilty plea, all the incentives to plea bargain disappear; the defendant has nothing to lose by going to trial.*

Id. at 883 (citations omitted) (emphasis added). See also: *Ehl v. Estelle*, 654 F.2d 166 (5th Cir. 1981).

In *Hitchcock v. Wainwright*, 770 F.2d at 1514, 1518-1520 (11th Cir. 1985), *aff'd, on different grounds*, ___ U.S. ___, 107 S.Ct. 1821 (1987), the defendant asserted that he had been punished (in violation of the Due Process Clause) for exercising his right to a jury trial instead of accepting a plea agreement. The trial court and prosecutor allegedly offered the defendant a life sentence in exchange for a guilty plea. The defendant declined the offer. After trial, the court sentenced the defendant to death upon a jury's recommendation. The Eleventh Circuit assumed that the

defendant would have received the life sentence had he accepted the plea agreement.[2]

In discussing the applicability of *Pearce*, that court stated:

> Although the principle petitioner argues would apply on a retrial and a resentencing after a successful appeal, *North Carolina v. Pearce*, 395 U.S. 711, 726, 89 S.Ct. 2072, 2081, 23 L.Ed.2d 656 (1969); *Blackledge v. Perry*, 417 U.S. 21, 28-29, 94 S.Ct. 2098, 2102-2103, 40 L.Ed.2d 628 (1974), it does not apply to the failure of a plea bargain. *Bordenkircher v. Hayes*, 434 U.S. 357, 363, 98 S.Ct. 663, 668, 54 L.Ed.2d 604 (1978). In the "give-and-take" of plea bargaining, the state may extend leniency to a defendant who pleads guilty foregoing his right to jury trial. *Brady v. United States*, 397 U.S. 742, 753, 90 S.Ct. 1463, 1471, 25 L.Ed.2d 747 (1970). Legislative schemes which extend the possibility of leniency to defendants who plead guilty are permissible so long as the statute does not unnecessarily burden the assertion of constitutional rights or act to coerce inaccurate guilty pleas. *Compare United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968) (statute invalid when defendant could only receive death sentence if he went to trial) *with Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978) (statute valid when plea of *non vult* gave possibility of sentence of not more than 30 years but conviction at trial carried mandatory life sentence). A judge, as with the prosecutor and the legislature, should not be precluded from approving leniency in sentencing upon an admission of guilt. *Cf. Corbitt*, 439 U.S. at 224 n. 14, 99 S.Ct. at 500 n. 14 (cannot permit prosecutor to offer leniency but not legislature).

---

[2] The reported facts indicate that record was not clear on whether the court actually agreed to the agreement or merely stated he would consider it.

Sentencing after conviction following a failed plea bargain presents a different situation from sentencing after a prior sentence and retrial. Upon a second conviction, a defendant stands in the same posture for sentencing that he did after his first conviction. Presumably all facts have been before the court for determination of the correct sentence. Unless the court cites circumstances which occurred after his original sentence, a greater sentence would appear to be for no reason other than a penalty for the defendant's challenging of his conviction. See Wasman v. United States, ___ U.S. ___, 104 S.Ct. 3217, 82 L.Ed.2d 424 (1984). *A defendant who pleads guilty, however, is in a markedly different posture than a defendant who is convicted at trial. Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation. Moreover, by pleading guilty a defendant confers a "substantial benefit to the state:"*

> the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

Brady v. United States, 397 U.S. at 752, 90 S.Ct. at 1471. The state is entitled to extend a sentence of less than that which might otherwise be appropriate to a defendant that confers such a benefit on it. 397 U.S. at 753, 90 S.Ct. at 1471. The heart of a plea bargain from a defendant's point of view is the option of

avoiding a possibly harsher sentence upon conviction at trial.

Id. at 1518-1519[3] (emphasis added).

In the *Pearce* situation, where the sentencing court theoretically had all the necessary facts in front of it at the original sentencing, hearing there is but one logical explanation for the increased sentence (absent an explanation by the judge) and that – as this Court has held – is judicial vindictiveness. Such is not the case in the post plea agreement situation. In this situation, the judge could be increasing the sentence because the defendant has not conferred any benefit on the state and therefore he need not be lenient. This would be the judicial equivalent of the facts in *Bordenkircher*. The judge could be increasing the sentence because he is now fully aware of the nature of the crime, the impact on the victim, and the degree and nature of the defendant's involvement in the crime. The mere fact that the defendant received a stiffer sentence is not an accurate measure of judicial vindictiveness, just as it is not an accurate measure of prosecutorial vindictiveness. *Goodwin*, 457 U.S. at 381. The facts of this case illustrate the point.

At the guilty plea hearing, the Respondent gave only the barest of details of the crimes stating simply that he cut the screen and went into the victim's house and had sex with the victim. (J.A. 15-16) He did admit he had a butcher knife (J.A. 16) and described the scanty apparel he was wearing at the time of the crime. (J.A. 17-18)

---

[3] The Second Circuit has rejected the above analysis in *Robinson v. Scully*, 690 F.2d 21 (2nd Cir. 1982).

At the sentencing hearing (on the plea bargain) the victim testified that she and her children were afraid of living in their home. (J.A. 19-20) The court did acknowledge the "pain and mental problems" Respondent caused the victim. (J.A. 21-22) Prior to sentencing at the guilty plea, the court also had a pre-sentence investigation which gives only the meagerest "details" of the offense. (J.A. 26-47) The impact of the crime on the victim is more detailed but the ordeal she suffered is not presented.

After the victim's testimony at trial the court for the first time became aware of the full nature of the crime and its impact on the victim. For the first time, he became aware of the fact that the attack lasted approximately one hour; that the Respondent committed at least four acts of rape and two of sodomy; that the Respondent held a knife to the victim's chest during a portion of the attack; that the victim's three young children were across the hall when the attack took place.

The above additional facts fully justify the increased sentence and also demonstrated why this Court should not extend *Pearce* into this fact situation. After a trial, the sentencing court will most always know facts he was unaware of if a guilty plea had been entered. To presume that the trial judges of this country are acting vindictively in light of the new facts, is a disservice to them.[4]

---

[4] The Petitioners are not suggesting that a defendant be foreclosed from proving vindictiveness in the post-plea-bargain situation. Petitioners are merely arguing that there should be no presumption of vindictiveness and the defendant should bear the burden of proof. See, e.g., *Goodwin*, 457 U.S. at 381, n. 12 (1982).

Since the sentencing court is not in the same position as he was when he sentenced the defendant after a plea agreement, the *Pearce* analysis and its remedy should not apply.

The analysis contained in *Hitchcock* and *Frank*, and illustrated by the facts of this case, are sound since they more accurately reflect the true situation a judge is in when he re-sentences a defendant after a failed plea bargain and full trial. As noted in *Frank* and *Hitchcock*, to apply the presumption to a post-plea-bargain situation would totally destroy the plea bargaining system. Since there is no realistic likelihood of vindictiveness the Court should not impose the *Pearce* presumption.

II.

THE ALABAMA SUPREME COURT ERRED IN HOLDING THAT THE ENHANCEMENT OF A DEFENDANT'S SENTENCE FOLLOWING A RETRIAL UPON WITHDRAWAL OF A GUILTY PLEA CAN ONLY BE BASED ON CONDUCT OCCURRING AFTER THE ORIGINAL SENTENCE AND NOT UPON FACTS CONCERNING THE CRIME THAT WERE ELUCIDATED AT THE RETRIAL.

The Respondent, James Lewis Smith, had entered a guilty plea for rape in the first degree and burglary in the first degree and was sentenced to two thirty year concurrent sentences. He successfully challenged his plea on appeal and was tried before the same judge who had accepted the plea on the charges of rape in the first degree, burglary in the first degree, and sodomy in the first degree which had been nol prossed pursuant to a plea agreement but was reinstated after the withdrawal of the plea. The Respondent was convicted on all charges.

At the sentencing hearing, the trial judge stated that upon sentencing the Respondent following his guilty plea, he was unaware of the details and the flavor of the offense which had been elucidated at trial. The court went further and noted that it was not acting vindictively in enhancing the Respondent's sentence because of his successful appeal of his guilty plea, but was enhancing the sentence because of the details of the offense learned at trial pursuant to its interpretation of *North Carolina v. Pearce*. Whereupon, the trial court sentenced the Respondent to two concurrent life sentences for the burglary and sodomy charges and a 150 year consecutive sentence for the rape. (R. 401-402). The case was eventually appealed to the Alabama Supreme Court which reviewed the propriety of the burglary sentence. In its April 8, 1988 opinion, the Court held that the trial court erred in enhancing the Respondent's burglary sentence. Under its interpretation of *Pearce*, the Alabama Supreme Court reasoned that a sentence can only be enhanced because of events occurring after a defendant's original sentence which cast light upon his character. However, in so holding, the Alabama Supreme Court ignored opinions of this Honorable Court which, rather than following the literal language of *Pearce*, examine the likelihood of vindictiveness and whether the presumption of vindictiveness was rebutted. (J.A. 96-99)

The rule is well settled that a judge or other sentencing authority is given broad discretion in determining an appropriate sentence. The sentencing authority must be allowed to consider all information which would bear on the proper sentence for the particular defendant given the crime committed. *Wasman v. United States*, 468 U.S.

559 (1984). This point was particularly made in *Williams v. New York*, 337 U.S. 241, 247 (1949) where this Court stated:

> "[h]ighly relevant – if not essential – to [the] selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics."

Only by allowing such a breadth of information can an appropriate sentence be determined. *Wasman*, 468 U.S. at 564.

However, this Court in *North Carolina v. Pearce* placed a limitation upon this discretion. Two separate cases were before this Court in *Pearce*, and in both cases, the defendants had successfully challenged their convictions but were given greater sentences following retrial than they had originally received. This Court held that neither the Double Jeopardy Clause nor the Equal Protection Clause prevents the enhancement of sentence after reconviction so long as the enhancement was not motivated by vindictive retaliation by the judge. Particularly, this Court stated, "Due Process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Pearce*, 395 U.S. at 725. Such retaliation would chill a defendant's constitutional right to appeal or to attack his conviction collaterally. To prevent such retaliation, this Court imposed a prophylactic rule that presumed vindictiveness but which could be overcome "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear."

Pearce, 395 U.S. at 726. This Court then noted an example when the enhancement of a sentence is justified.

> "A trial judge is not constitutionally precluded . . . from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities . . . ' Such information may come to the judge's attention from evidence adduced at the second trial itself, from a new pre-sentence investigation, from the defendant's prison record, or possibly from other sources."

Id. at 723.

It is from this language that the Alabama Supreme Court premised its opinion that a trial judge can only enhance a defendant's sentence for events subsequent to the first trial. The court failed to note, though, that in *Pearce*, unlike the case *sub judice*, the record was devoid of any explanation of the enhanced sentence to rebut the presumption of vindictiveness.

Since *Pearce*, this Court has examined on several occasions whether vindictive retaliation played a role where a defendant was given a greater sentence on retrial than he originally received.

Blackledge v. Perry, 417 U.S. 21 (1974), represents the only other instance where the presumption of vindictiveness was not overcome. In *Blackledge*, the defendant, a state prisoner, was charged with the misdemeanor offense of assault with a deadly weapon. He was convicted in district court and sentenced to six months consecutive to the sentence in which he was serving. He appealed to the County Superior Court for a trial de

novo. After notice of appeal was filed but prior to trial, the prosecutor obtained a felony assault indictment. The defendant pleaded guilty to the felony and was sentenced to five years. This Court held that due process does not summarily preclude enhancement of a sentence, but it does preclude those instances "that pose a realistic likelihood of vindictiveness." *Id.* at 27. The prosecutor in *Blackledge* had a personal stake in the outcome, and since the record was absent of any explanation by the prosecutor as to why the felony indictment was obtained, the presumption of vindictiveness set forward in *Pearce* was indulged and relief was granted.

The presumption, however, was not applied in *Colten v. Kentucky*, 407 U.S. 104 (1972); in context of Kentucky's trial de novo appeal system. This Court rejected the position that a de novo tribunal was prohibited from imposing a greater sentence than the sentence imposed following the original trial.

In *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), this Court found that the presumption of vindictiveness did not arise where a sentence was enhanced by a jury upon retrial. This Court found that the possibility of vindictiveness in this situation was minimal since a jury does not have a personal stake in the outcome like a judge or prosecutor. In so holding, this Court stated:

> "*Pearce* was not written with a view to protecting against the mere possibility that, once the slate is wiped clean and the prosecution begins anew, a fresh sentence may be higher for some valid reason associated with the need for flexibility and discretion in the sentencing process." *Chaffin*, 412 U.S. at 26.

Indeed, *Pearce* was only "premised on the apparent need to guard against vindictiveness in the sentencing process." *Chaffin*, 412 U.S. at 25.

Since the prophylactic rule in *Pearce* is merely to guard against vindictiveness, it should not be applied in the instant case. Unlike in *Pearce*, the trial judge in the instant case provides an explanation of the enhancement of the Respondent's sentence which clearly rebuts even the slightest inference of vindictiveness. Indeed, the judge specifically stated that he was not acting vindictively in enhancing the Respondent's sentence but was doing so because he had learned from the trial the cruelty of the offense. Since an adequate explanation appears on the record, the Alabama Supreme Court incorrectly applied the presumption of vindictiveness.

In *Bordenkircher*, 434 U.S. at 357, this Court refused to apply the presumption of vindictiveness to plea bargaining. This Court found that any retaliation was merely a by-product of plea negotiations. *Id.* at 362.

In *United States v. Goodwin*, 457 U.S. 368 (1982), this Court again found the presumption of vindictiveness was unwarranted where the prosecutor added a felony charge, prior to trial, to a defendant's misdemeanor charge after he had made a demand for a jury trial on the misdemeanor charge. *Goodwin* is pertinent to the instant case because it notes that the presumption of vindictiveness "may be overcome only by objective information on the record justifying the increased sentence." *Id.* at 374. *Goodwin* is also relevant because it expresses a reluctance by this Court to extend the presumption to instances where the likelihood of vindictiveness is not pronounced

since the presumption could often block "a legitimate response to criminal conduct." *Id.* at 773; *Wasman*, 468 U.S. at 566.

These holdings applying the rule set forth in *Pearce* clarify this Court's view "that due process does not in any sense forbid enhanced sentences or charges, but only enhancement motivated by actual vindictiveness toward the defendant for having exercised guaranteed rights." *Wasman*, 468 U.S. at 568. In *Pearce* and *Blackledge*, the presumption of vindictiveness was applied and the defendant's rights to due process violated not because of the enhanced sentence but because there was no evidence on the record justifying the increase. In *Colten*, *Chaffin*, *Bordenkircher* and *Goodwin*, where the presumption was not applied, a violation of due process could still be established but only by proof of actual vindictiveness. *Wasman*, 468 U.S. at 569. Thus, where the presumption applies, the sentencing authority or the prosecutor must justify the increased sentence or charge, where the presumption does not lie, the defendant must prove actual vindictiveness. *Id.*

This Court in *Wasman*, 468 U.S. at 559, on facts closely analogous to the instant case, found that the presumption of vindictiveness was amply rebutted by the conduct of the trial court. In *Wasman*, the defendant was charged with mail fraud, but prior to trial he was indicted, tried, and convicted on the unrelated charge of knowingly and willingly making false statements in a passport application. At the sentencing hearing, the defendant's trial counsel urged the court not to consider the mail fraud charges in imposing the sentence. The trial court agreed and sentenced the defendant to two years,

all but six months of which were suspended in favor of three years probation. Thereafter, pursuant to a plea agreement, the Government dismissed the mail fraud indictment and the defendant entered a plea of *nolo contendre* and was sentenced by another judge to two years probation. *Id.* at 561.

Subsequently, the Court of Appeals reversed the defendant's first conviction, and he was retried and convicted before the same judge who initially heard the case. The judge sentenced the defendant to two years imprisonment, none of which was suspended. The judge explained that he was imposing the greater sentence because of the intervening conviction stating,

> "[W]hen I imposed sentence the first time, the only conviction on [petitioner's] record in this Court's eyes, this Court's consideration, was failure to file income tax returns, nothing else. I did not consider then and I don't in other cases either, pending matters because that would result in a pyramiding of sentences. At this time, he comes before me with two convictions. Last time, he came before me with one conviction."

Id. at 562.

The defendant asserted, as the Alabama Supreme Court in the instant case had, that the trial court was foreclosed from considering the intervening conviction by the plain language of *Pearce* since an increase of the sentence following a retrial "must be based upon objective information concerning identifiable conduct on part of the defendant occurring after the original sentencing proceeding." *Id.* at 570, citing *Pearce*, 395 U.S. at 726. This Court rejected this argument. Even though the presumption of vindictiveness was applied because of the

increased harshness of sentence, this Court held that the presumption was amply rebutted by the explanation of the trial court. *Wasman*, 468 U.S. at 469-470. Further, this Court concluded that *Pearce* does not preclude the consideration of an intervening conviction for an offense committed prior to the original sentencing. *Id.* at 571.

The impact of *Wasman* on the instant case is apparent. This Court refused to limit *Pearce*, as the Alabama Supreme Court would do, to permit only the consideration of conduct occurring after the original sentence in enhancing a defendant's sentence. Rather, where the presumption of vindictiveness is applied, it can be readily rebutted by an explanation of the increase by the trial court. In *Wasman*, the justification was the intervening conviction, and it was deemed sufficient by this Court. In the instant case, the justification is that the judge learned from the trial the flavor of the offense; this justification has also been deemed sufficient by this Court.

In *Texas v. McCullough*, 475 U.S. 134 (1986), this Court found that the presumption of vindictiveness was unwarranted on facts closely akin to those of the instant case. In *McCullough*, the defendant was convicted of murder and sentenced by the jury to twenty years. The trial judge granted his motion for new trial because of prosecutorial misconduct. The defendant was retried, and at this trial, the State presented testimony of two witnesses who did not testify at the first trial that the defendant rather than his accomplices committed the murder. The defendant was again convicted, but on this occasion, he opted to be sentenced by the judge. He was sentenced to fifty years imprisonment. The sentence was increased, the trial court explained, because of the new testimony presented at the

trial court explained, because of the new testimony presented at the retrial, because the court had learned at the retrial that the defendant had been released from prison for only four months prior to the crime, and because the court felt that the twenty year sentence initially imposed was too lenient. *Id.* at 978.

This Court found that the facts presented provided no basis for a presumption of vindictiveness. *Id.* at 979. The judge in *McCullough* was not reversed but granted the motion new trial herself; thus there was "no motivation to engage in self-vindication." *Id.* at 979, quoting *Chaffin*, 412 U.S. at 27. This Court went further and stated, "Presuming vindictiveness on this basis alone would be tantamount to presuming that a judge will be vindictive towards a defendant merely because he seeks acquittal." *Id.* at 979.

Further, this Court found that even if the *Pearce* presumption was applicable, it was sufficiently rebutted. This Court stated, "Nothing in *Pearce* is to be read as precluding a rebuttal of intimations of vindictiveness. . . . Restricting justifications for a sentence increase to only 'events that occurred subsequent to the original sentencing proceeding' could in some circumstances lead to absurd results." *Id.* at 980-981. Thus, this Court concluded that details of the offense learned at the retrial can be used to justify the enhancement of a defendant's sentence.

As in *McCullough*, the trial court in the instant case justified its enhancement of the Respondent's sentence because of details it learned of the offense at retrial. In its explanation, the trial court stated that it was unaware

following the Respondent's guilty plea proceeding that he actually had raped the victim five times, sodomized her on several occasions, and threatened the victim's life at knifepoint. Because of these facts, it enhanced the Respondent's sentence.

To extend the analysis of *Wasman* and *McCullough* to instances where a defendant is retried following the withdrawal of a guilty plea is logical and consistent with the preceding opinions of this Court. A guilty plea proceeding is sterile without full development of the facts. However, upon retrial, the flavor of the offense and its impact upon the victim is uncovered. Because of this development, the trial court can impose a sentence befitting the defendant and the crime. Thus, under this situation, an enhancement of a defendant's sentence can be readily justified. This analysis has been extended to this situation by the United States Courts of Appeals. *See, e.g., United States v. Carter*, 804 F.2d 508 (9th Cir. 1986); *Hitchcock*, 771 F.2d at 1514 (11th Cir. 1985); *Frank*, 646 F.2d at 873.

Upon applying the analysis of *Wasman* and *McCullough* to the instant case, this Court should uphold the increased sentence. The trial court's explanation clearly rebuts any presumption of vindictiveness. The Alabama Supreme Court was erroneous in adhering to the literal wording of *Pearce* rather than examining the likelihood of vindictiveness. Since the presumption is readily refuted, this Court should reverse the holding of the Alabama Supreme Court and uphold the imposition of the increased sentence.

CONCLUSION

This Court should reverse the Alabama Supreme Court's ruling and hold that the *Pearce* presumption does not apply to post-plea-bargain sentencing.

This Court should further hold that the trial court correctly considered facts developed at trial in justifying the increased sentence and the Alabama Supreme Court's ruling to the contrary is erroneous.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF ALABAMA, PETITIONER

v.

JAMES LEWIS SMITH

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

The respondent in this case entered a guilty plea and was sentenced. Subsequently, he withdrew his guilty plea, went to trial, and was convicted. The trial court then sentenced respondent to a longer term of imprisonment than the court had imposed following respondent's guilty plea. The question presented is whether that sentence was "vindictive" under the principles articulated in this Court's decision in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969).

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INTEREST OF THE UNITED STATES

This case involves the application of the presumption of "vindictiveness" under *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), a presumption that applies equally to federal criminal cases. The question presented is whether, under *Pearce*, a defendant who withdraws his guilty plea and is convicted after trial may be given a greater sentence than the one he received following his guilty plea. That question arises routinely in the federal system. Moreover, under the recently promulgated Sentencing Guidelines, federal judges are entitled to impose a more lenient sentence on a defendant who, by pleading guilty, has demonstrated an "acceptance of responsibility" for his offense. United

States Sentencing Comm'n, *Sentencing Guidelines and Policy Statements* § 3E1.1(a), (c), Commentary (1988). The United States therefore has a continuing interest in the question whether *Pearce* forbids a court from sentencing a defendant who does not plead guilty more harshly than one who does.

STATEMENT

1. In November 1985, respondent was charged, in three separate indictments, with first degree sodomy, first degree rape, and first degree burglary. All three charges arose from respondent's September 14, 1985, assault on Vickie Hurst. C.A. App. 415-423. On January 6, 1986, respondent entered a guilty plea to the rape and burglary charges. In his allocution, respondent acknowledged that at about 1:30 a.m. on the date in question, he went to Ms. Hurst's house, cut through a screened window, and, holding a knife, had "ha[d] sex" with his victim. In exchange for respondent's plea to the two charges, the State moved to dismiss the sodomy charge. The trial court granted that motion and accepted respondent's guilty plea. 1/6/86 and 1/17/86 Tr. R-3 to R-4, R-14 to R-20.

On January 17, 1986, respondent appeared before the trial court for sentencing. The court had already received presentence reports concerning the offense (J.A. 27, 37), which stated that respondent had "broke[n] into the residence of Vickie Hurst * * * while [she] and her three children were at home" and had forced Ms. Hurst "to engage in oral intercourse * * * [and] sexual intercourse with him." The sentencing court also heard from Ms. Hurst, respondent's victim, who advised the court of her fear that if respondent "[got] out, he [would] do it again." The trial court imposed concurrent terms of 30 years' imprisonment on each charge. 1/6/86 and 1/17/86 Tr. R-20 to R-28.

Respondent thereafter moved to withdraw his guilty plea, contending that he had not entered it knowingly or voluntarily. The trial court denied that motion, but the Alabama Court of Criminal Appeals reversed and remanded. It held that respondent had not been accurately apprised of the penalties associated with the crimes to which he had pleaded guilty. Pet. App. 2; *Smith* v. *State*, 494 So. 2d 182 (1986).

2. On remand, the State moved to reinstate the previously dismissed charge of first degree sodomy. The trial court granted that motion, and respondent proceeded to trial on all three original charges. Pet. App. 2.

At trial, Ms. Hurst testified that on September 13, 1985, after putting her three children to bed across the hall, she was in her room watching television. In the early morning hours, she heard a noise in the hallway. She looked up and saw a man, later identified as the respondent, with a mask pulled over his face. The man was dressed only in his underwear, and he was carrying a kitchen knife with a shiny blade and a wooden handle. Respondent ran toward Ms. Hurst with the knife, put his hand over her mouth, pulled her down onto the bed, and removed her underwear. Holding the knife to Ms. Hurst's chest, and later placing it beside her on the bed, respondent then forced his victim to have intercourse with him at least four times and "in different positions." In addition, respondent forced Ms. Hurst to perform oral sex on him and to permit him to do the same to her.[1] In all, respondent's attack on

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[1] Ms. Hurst explained that each time that respondent moved to a new position, she would ask him not to rape her again. Respondent told her he was not raping her, but was only "doing what [he] always wanted to do." C.A. App. R-136 to R-137.

his victim lasted more than one hour. C.A. App. R-126 to R-146.[2]

The State also offered respondent's post-arrest statement, in which respondent admitted many of the details of the offenses. For example, in his statement respondent acknowledged that he had entered Ms. Hurst's apartment, while dressed in his underwear, with a cap pulled over his face, and carrying a knife. He also admitted that he had gotten into Ms. Hurst's bed and that he had had intercourse with her. Respondent asserted in this statement, however, that Ms. Hurst did not resist having intercourse with him; and although he acknowledged that he had tried to have oral sex as well, he claimed that he had acceded to Ms. Hurst's refusal to do so. Respondent stated that he had gone to Ms. Hurst's apartment because he had "felt empty" and "wanted to be loved." C.A. App. R-197 to R-203.

Respondent took the stand at trial and claimed that he had been in bed with his girlfriend at the time the rape took place (C.A. App. R-283 to R-284). He explained that he had offered the confession to the police only "because the two officers that questioned [him had] set themselves up as judge and jury and [had] offered [him] no self defense, legal representation" (*id.* at R-303). Respondent characterized his statements to the police as "running off at the mouth" (*id.* at R-301) and "just babble" (*id.* at R-305).

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[2] Ms. Hurst also testified that she had recognized respondent, who was one of her neighbors, from the sound of his voice during the attack (C.A. App. R-143). Confirming the point, the evidence showed that four days after the offense, Ms. Hurst selected respondent's voice from a "voice lineup," in which five persons, including respondent, were required to speak certain of the words that, according to Ms. Hurst, had been spoken by the assailant (*id.* at R-156 to R-157, R-190 to R-193).

Respondent was convicted on all three charges (C.A. App. R-393), and on August 22, 1986, he appeared a second time for sentencing before the trial court. The court imposed concurrent terms of life imprisonment on the burglary and sodomy convictions and a consecutive term of 150 years' imprisonment on the rape conviction (*id.* at R-396, R-403 to R-404). The trial court explained that at the time the court sentenced respondent on his guilty plea, respondent had told the court only "[his] side of the story" (Pet. App. 28). "[N]ow," the court stated, "the court has had a trial and heard all of the evidence," including the "testimony which consisted of raping the victim at least five times," and evidence showing respondent's "mental outlook on it and [his] position during the trial" (*id.* at 28-30). Although the court emphasized that it was not increasing respondent's sentence based "on the fact that [he] was successful on [his] appeal" (*id.* at 28), it concluded that it was "proper to increase the sentence beyond that which was given to [respondent] on the plea bargain" (*id.* at 30).[3]

3. The Court of Criminal Appeals affirmed respondent's convictions, as well as his life sentences for sodomy and burglary, while remanding the rape conviction for resentencing. The Alabama Supreme Court thereafter granted respondent's request for review of the burglary sentence, and it reversed and remanded by a divided vote (Pet. App. 1-14). The court held that " 'there can be no

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[3] In response to defense counsel's claim that the sentences were excessive (C.A. App. R-409), the trial court observed that at the time of the initial sentencing it had had "no knowledge that [respondent] raped the woman five times" and "sodomized her twice * * * with the children across the hall, with the knife basically at her throat at all times * * * at 1:00 or 2:00 a.m. with a ski mask on" (*id.* at R-410 to R-411). The court stated that, in retrospect, the sentence that it had imposed the first time "may not have been harsh enough" (*id.* at R-411).

increase in a sentence in a criminal case after the sentence is imposed' " (Pet. App. 5 (citation omitted)). To increase a sentence under those circumstances, the court reasoned, would " 'den[y] the prisoner the protection of his original sentence as a condition to the right of his appealing his conviction or exercising his post-conviction remedies' " (*ibid.* (citation omitted)). The court acknowledged that in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court held that " '[a] trial judge is not constitutionally precluded * * * from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities" ' " (Pet. App. 5-6 (quoting 395 U.S. at 723)). But the court construed the language in *Pearce* to authorize an increased sentence only when it is justified by "events subsequent to the first trial" (*id.* at 7). Because the trial court had increased respondent's sentence based on the evidence adduced at the trial, the court set aside respondent's sentence on the burglary conviction.

Justice Maddox dissented (Pet. App. 8-14). In his view, "the principles of *North Carolina* v. *Pearce* * * * [do] not apply" where the original sentence follows a voluntary guilty plea (*id.* at 9-10). Justice Maddox explained that a defendant "should not be allowed to receive sentence concessions in return for a guilty plea and then, after a successful attack on that plea, bind the State to its original sentencing bargain if he is later convicted after a trial" (*id.* at 14). Were the law otherwise, he stated, a defendant "could go to trial and chance an acquittal knowing he could receive a sentence no harsher than he was originally given" (*ibid.*).[4]

[4] The Alabama Supreme Court subsequently denied the State's application for rehearing (Pet. App. 15). Justice Maddox again dissented (*id.* at 15-27). He explained (*id.* at 26) that "[a] defendant is free to accept or reject the [plea] offer of the State. Once it is rejected, however, the defendant cannot complain that the denial of the benefits of the offer he rejected constitutes punishment or evidences judicial vindictiveness."

SUMMARY OF ARGUMENT

In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court held that before a trial court may increase a sentence following a criminal defendant's exercise of a post-conviction right of review, the increased penalty must be justified by a showing of legitimate, non-vindictive motivating factors. Relying on *Pearce*, the Alabama Supreme Court held that a trial court may not impose on a defendant who was convicted at trial a harsher sentence than the one the court imposed after the defendant pleaded guilty. That holding extends *Pearce* to a precinct in which it was never meant to apply.

A. This Court has made clear that the presumption of vindictiveness articulated in *Pearce* must be confined to the special context in which that case arose. The Court has explained that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a realistic likelihood of 'vindictiveness.' " *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974). Thus, the Court has always restricted the application of *Pearce* "to areas where its 'objectives are thought most efficaciously served.' " *Texas* v. *McCullough*, 475 U.S. 134, 138 (1986) (citation omitted).

B. For three reasons, a reviewing court should not presume vindictiveness in the context presented by this case.

First, a trial on the merits will usually afford the trial court a more complete account of the crime than is provided by a simple plea allocution. For that reason, a court that has heard all the evidence at a full trial on the

merits will often be in a better position to impose an appropriate sentence than it was after a guilty plea. The court's decision to impose a stiffer sentence after a full trial is thus likely to be the product of better information—as it was in this case—and not the product of judicial vindictiveness.

Second, a defendant who has pleaded guilty, and who has thereby acknowledged his responsibility for an offense, may well deserve a more lenient sentence. This Court and others have routinely approved more favorable sentencing treatment for defendants whose guilty pleas reflect contrition and personal accountability. By contrast, a defendant who has gone to trial may well not have earned specially lenient sentencing treatment, particularly if the defendant—in the judgment of the sentencing court—gives false testimony at trial. A difference in treatment between a defendant who has pleaded guilty and one who has gone to trial is therefore entirely legitimate and does not warrant a presumption of vindictiveness.

Finally, these two reasons suggest a third, more general one: a presumption of vindictiveness in this setting is fundamentally incompatible with the accepted role of plea bargaining in the criminal justice system. Under the Alabama Supreme Court's view, a defendant who has been sentenced based on a plea bargain may withdraw from that plea and proceed to trial, running no risk that he may be sentenced more severely than he was the first time. Such an application of the rule in *Pearce* would entirely remove a defendant's incentive to enter into binding plea agreements.

C. Even if a presumption of vindictiveness were appropriate in this case, the trial court's findings easily overcome that presumption. The trial court explained that it imposed a harsher sentence because the evidence at trial showed respondent's crime to be far more serious than the

court had previously supposed. The Alabama Supreme Court held (Pet. App. 4) that the trial court did not rely on an "event[] subsequent to the [respondent's] first conviction" and that its findings therefore did not satisfy the burden imposed by *Pearce*. That conclusion, however, is flatly inconsistent with this Court's decision in *Texas* v. *McCullough*, 475 U.S. at 141-144. In that case, the Court upheld a heavier sentence following a second trial, where that sentence was based on additional facts about the underlying offense that emerged, for the first time, at the second trial.

ARGUMENT

A DEFENDANT WHO WITHDRAWS HIS GUILTY PLEA AFTER HE HAS BEEN SENTENCED MAY CONSTITUTIONALLY BE SUBJECTED TO AN INCREASED SENTENCE FOLLOWING HIS CONVICTION AT TRIAL

A. Vindictiveness May Be Inferred Only In Those Special Contexts In Which There Is A Realistic Possibility That The Defendant's Sentence Has Been Increased To Penalize Him For Exercising A Legal Right

1. In *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), this Court reviewed the actions of state trial judges who had increased two defendants' sentences after the defendants successfully invoked post-conviction review procedures and obtained reversals of their convictions. The Court concluded that the Due Process Clause limits the imposition of harsher sentences on retrial after a successful appeal. In one of the cases, the Court found it "inescapable" that the trial judge was "punishing [the defendant] for having exercised his post-conviction right of review" (*id.* at 726); in the other case, no "reason or justification" was suggested for the increased sentence "beyond the naked power to impose it" (*ibid.*). In analyzing the enhanced sentences in those cases, the Court explained that imposing a more severe sentence "for the ex-

plicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside" would violate the Due Process Clause (*id.* at 723-724). The Court noted, however, that the "existence of a retaliatory motivation" would be "difficult to prove in any individual case" (*id.* at 725 n.20). In view of the clear hazard that vindictiveness motivated the sentences before it, and the difficulty in obtaining reliable proof on that issue, the Court adopted a special prophylactic rule (*id.* at 726):

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.

In *Blackledge* v. *Perry*, 417 U.S. 21 (1974), this Court adopted a similar prophylactic rule, to guard against vindictiveness by the prosecutor at the post-conviction stage. In that case the defendant sought a trial de novo in a state superior court following his initial misdemeanor conviction. The prosecutor responded immediately to the exercise of that post-conviction right by obtaining a felony indictment, which resulted in a sentence after conviction of five to seven years' imprisonment. The Court concluded that "the opportunities for vindictiveness in this situation are such as to impel the conclusion that due process of law requires a rule analogous to that of the *Pearce* case." *Id.* at 27. The Court reached that conclusion only after finding that there was a "realistic likelihood of 'vindictiveness,' " because the "prosecutor clearly has a considerable stake in discouraging convicted misdemeanants from appealing and thus obtaining a trial *de novo*." *Ibid.* In this context,

the Court ruled that "it was not constitutionally permissible for the State to respond to [the defendant's] invocation of his statutory right to appeal by bringing a more serious charge" (*id.* at 28-29), absent a showing that would dispel the appearance of vindictiveness, such as a demonstration "that it was impossible to proceed on the more serious charge at the outset." *Id.* at 29 n.7.

2. While recognizing that a presumption of vindictiveness is appropriate in settings such as those presented in *Pearce* and *Perry*, the Court has made clear that the presumption should not be applied outside the special contexts in which it was developed. The Court has therefore refused to extend the presumption to cases in which it was not likely that the increase in penalty exposure was triggered by the exercise of a procedural right, or in which an increase, even if triggered by the exercise of a procedural right, serves a legitimate purpose apart from penalizing the accused for exercising a procedural right.

In *Colten* v. *Kentucky*, 407 U.S. 104 (1972), for example, this Court declined to extend the prophylactic sentencing rule prescribed in *Pearce* to a two-tier prosecution system in which the defendant was first convicted in an inferior court and then appealed to a court of general jurisdiction for a trial de novo. The defendant claimed that imposition of greater punishment for the same charge following his appeal to the court of general jurisdiction was a "vindictive" response to his decision to seek a post-conviction remedy. This Court rejected that contention, concluding that the sentencing system did not present "hazards warranting the restraints called for in *North Carolina* v. *Pearce*" (407 U.S. at 119). While the Court recognized that *Pearce* prohibited the imposition of "a more severe penalty after reconviction * * * as purposeful punishment for having successfully appealed," it did not believe that, in the situation before it, vindictive responses

would occur "with sufficient frequency to warrant the imposition of a prophylactic rule" (*id.* at 116). The Court saw no logical basis for adopting a presumption that the court of general jurisdiction, which resentenced the defendant following his trial de novo, would respond to the defendant's request for a trial de novo in a vindictive manner (*id.* at 117).

Similarly, in *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), where a second jury imposed a more severe sentence on a defendant upon retrial following reversal of his original conviction, the Court refused to apply the prophylactic rule announced in *Pearce*. The Court concluded that the "hazard of vindictiveness" (*id.* at 25) is not present when a new jury imposes sentence following reconviction. While the Court recognized that a more severe sentence would be impermissible if its "only objective * * * is to discourage the exercise of constitutional rights" (*id.* at 33 n.20), it found that the "potential for such abuse of the sentencing process by the jury is * * * de minimis, in a properly controlled retrial" (*id.* at 26). In view of its conclusion that there was no "real threat of vindictiveness" in the case before it (*id.* at 28), the Court dismissed the suggestion that the risk of an enhancement of penalties after the exercise of a procedural right imposes an improper "chilling effect" on defendants (*id.* at 29-35). The Court noted that the defendant at bar "was not himself 'chilled' in the exercise of his right to appeal," and it expressed doubt that "the 'chill factor' will often be a deterrent of any significance" (*id.* at 33).

These cases make plain that "the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of 'vindictiveness.' " *Perry*, 417 U.S. at 27. Accordingly, "[l]ike other 'judicially created means of effectuating the rights secured by the [Constitution],' "

this Court has "restricted application of *Pearce* to areas where its 'objectives are thought most efficaciously served.' " *Texas* v. *McCullough*, 475 U.S. 134, 138 (1986). "Given the severity of [the] presumption * * *—which may operate in the absence of any proof of an improper motive and thus may block a legitimate response to criminal conduct—the Court has [applied the presumption] only in cases in which a reasonable likelihood of vindictiveness exists." *United States* v. *Goodwin*, 457 U.S. 368, 373 (1982).

B. Vindictiveness Should Not Be Presumed Where a Defendant Withdraws A Guilty Plea After He Has Been Sentenced, And Is Given an Increased Sentence After He Is Convicted At Trial

When a defendant withdraws his guilty plea after sentencing, and is thereafter convicted at trial, it is not unusual for a trial court to determine that a heavier sentence is warranted. For three related reasons, no presumption of vindictiveness should attach to that determination.[5]

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[5] The federal courts of appeals have held with near uniformity that a trial court may impose a harsher sentence on a defendant who has withdrawn his guilty plea and has thereafter been convicted at trial. See, *e.g.*, *McKenzie* v. *Risley*, 842 F.2d 1525, 1536-1537 (9th Cir. 1988) (en banc); *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1064-1065 (5th Cir. 1987), cert. denied, No. 87-5052 (July 7, 1987); *United States* v. *Carter*, 804 F.2d 508, 513-515 (9th Cir. 1986); *United States* v. *Townsend*, 796 F.2d 158, 164 (6th Cir. 1986); *Hitchcock* v. *Wainwright*, 770 F.2d 1514, 1518-1520 (11th Cir. 1985), rev'd on other grounds, 481 U.S. 393 (1987). As far as we can tell, the lone exception is the Eighth Circuit's decision in *United States* v. *Gilliss*, 645 F.2d 1269 (1981). The court in *Gilliss* held that a trial court could not resentence a defendant whose guilty plea had been set aside in a habeas corpus proceeding to a term of imprisonment that failed to specify (as did the prior sentencing) that the defendant would be eligible for early parole under 18 U.S.C. 4205(b)(1). The court reasoned,

1. While a defendant's guilty plea allocution may furnish relatively few details about the underlying offense, a trial on the merits often affords the sentencing court a detailed picture of the crime and the defendant's responsibility for it. In taking a guilty plea in the federal system, for example, Fed. R. Crim. P. 11(f) requires the trial court to make "such inquiry as shall satisfy it that there is a factual basis for the plea." See *McCarthy* v. *United States*, 394 U.S. 459, 467 (1969). That inquiry, however, need only be "precise enough and sufficiently specific to show that the accused's conduct on the occasion involved was within the ambit of that defined as criminal." *United States* v. *Johnson*, 546 F.2d 1225, 1226 (5th Cir. 1977). Accordingly, "Rule 11 does not mandate that the defendant personally confirm every factual allegation in the indictment" (*United States* v. *Trott*, 779 F.2d 912, 914 (3d Cir. 1985)), and indeed an otherwise valid guilty plea may be accepted even if the defendant during the colloquy denies factual guilt (*North Carolina* v. *Alford*, 400 U.S. 25 (1970)). What is more, the trial court need not question the defendant at length about his role in the offense; "[a] sufficient factual basis can be found even when the court engages in the most rudimentary questioning of the defendant if the indictment and statement of the prosecution's evidence are sufficiently specific to make clear to the defendant exactly what is being admitted to" (*United States* v. *Fountain*, 777 F.2d 351, 355 (7th Cir. 1985), cert. denied, 475 U.S. 1029 (1986)).

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in part, that a trial court may not alter a prior sentence based simply on the fact that the trial on the merits has provided a more damaging picture of the offense. See 645 F.2d at 1284 & n.34. As we explain below (see pages 14-17, 23-24, *infra*), the Eighth Circuit's reasoning cannot be squared with the premises underlying *North Carolina* v. *Pearce*, or, more specifically, with the explicit holding in *Texas* v. *McCullough*, 475 U.S. 134 (1986).

Even when supplemented by a presentence report—containing, in the federal system, "information about the history of the defendant, including * * * any circumstances affecting his behavior" (Fed. R. Crim. P. 32(c)(2)(A))—a guilty plea allocution will seldom, if ever, provide as detailed an account of the crime as would a trial on the merits. The present case illustrates the point. The trial court explained that at the time of respondent's plea, it knew of only "one sex act [that] took place" (C.A. App. R-400). As a result of the trial, however, the court stated that it had become "aware that five separate sex acts occurred" (*ibid.*), including two acts of sodomy (*id.* at R-140) and three acts of intercourse (*id.* at R-402), each of which had been accompanied by armed threats on the victim's life (*ibid.*). Indeed, in light of the trial testimony the court suggested that the sentence following the guilty plea "may not have been harsh enough" (*id.* at R-411).

In addition to presenting a more detailed account of the crime generally, a trial on the merits will typically involve charges that were dismissed as part of the prior plea bargain and which were therefore not before the trial court when it initially sentenced the defendant. The "federal courts have generally held that a defendant who successfully challenges his guilty plea may be reindicted on the original charges, and if convicted, sentenced more severely." J. Bond, *Plea Bargaining and Guilty Pleas*, § 7.28(a), at 7-100 (1983) (footnote omitted).[6] In the present case, for example, the State moved to dismiss the

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[6] See, *e.g.*, *United States* v. *Townsend*, 796 F.2d 158, 164 (6th Cir. 1986); *United States* v. *Johnson*, 537 F.2d 1170, 1174-1175 (4th Cir. 1976); *United States* v. *Anderson*, 514 F.2d 583, 587-588 (7th Cir. 1975); *United States* v. *Rines*, 453 F.2d 878, 880 (3d Cir. 1971); *United States ex rel. Williams* v. *McMann*, 436 F.2d 103, 104-107 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971).

sodomy charge, as part of its plea bargain with respondent. When respondent successfully withdrew from the plea bargain, the sodomy charge was reinstated and tried to conviction. The trial court was therefore in a position, following the trial, to take account of a serious charge that was not before it when it previously sentenced respondent. The sodomy charge not only justified a substantial sentence wholly apart from the sentence imposed on the other two charges, but it helped complete the picture of the crime for the trial court and thus justified increased sentences on the rape and burglary charges as well.

Moreover, where, as here, a defendant testifies at trial, the trial on the merits will afford the sentencing court a more extensive opportunity to assess the defendant's attitude toward his offense, and therefore the defendant's moral culpability and susceptibility to rehabilitation. "[T]he trial judge's 'opportunity to observe the defendant, particularly if he chose to take the stand in his defense, can often provide useful insights into an appropriate disposition.' " *United States* v. *Grayson*, 438 U.S. 41, 50 (1978) (citation omitted). For example, a trial court is lawfully entitled to sentence a defendant more harshly if he has testified falsely at trial. *Id.* at 50-52; United States Sentencing Comm'n, *Sentencing Guidelines and Policy Statements* § 3C1.1, at 3.7 (1987). As this Court has noted, "it is proper—indeed, even necessary for the rational exercise of discretion—to consider the defendant's whole person and personality, as manifested by his conduct at trial and his testimony under oath, for whatever light those may shed on the sentencing decision." *United States* v. *Grayson*, 438 U.S. at 53. The trial court in the present case apparently exercised that discretion, explaining that it had increased respondent's sentences in part because of respondent's "mental outlook" on the crime and his "position during the trial and what [he] said" (C.A. App. R-402).

In short, a trial on the merits will typically afford the sentencing court a more complete picture of the offense and of the defendant's responsibility for it. For that reason, there is no basis for presuming that a harsher sentence following a trial is the product of vindictiveness. The more likely explanation is that the court has reached a different, and better informed judgment about the appropriate level of punishment, based on "the details, flavor and impact upon victims of the offense as presented at trial" (*United States* v. *Carter*, 804 F.2d 508, 514 (9th Cir. 1986)). Accordingly, in this setting, the realistic "hazard of vindictiveness * * * is de minimis" (*Chaffin* v. *Stynchcombe*, 412 U.S. at 25-26), and the *Pearce* presumption should not be applied.[7]

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[7] "Only after trial and a sentencing hearing has the trial court learned all of the facts which might be considered for sentencing. On a plea bargain, the defendant's and prosecutor's agreement forecloses the necessity for such a detailed explanation." *Hitchcock* v. *Wainwright*, 770 F.2d at 1519. See also *United States* v. *Cunningham*, 529 F.2d 884, 889 (6th Cir. 1976) (increased sentences following trial reflect "the sentencing judge's greater knowledge and better understanding acquired after hearing the full disclosure of the facts at the trial on the merits"). Cf. *Blackmon* v. *Wainwright*, 608 F.2d 183, 184 (5th Cir. 1979), cert. denied, 449 U.S. 852 (1980) (increased sentence following trial may reflect the fact that the trial court "had the benefit of hearing all of the trial testimony and may have based the sentence on the facts surrounding the robbery and the evidence of [the defendant's] guilt"); *United States* v. *Underwood*, 588 F.2d 1073, 1078 (5th Cir. 1979). As one court of appeals has summarized the point (*United States* v. *Derrick*, 519 F.2d 1, 4 (6th Cir. 1975)):

> [I]n a plea of guilty, the crime pleaded is understood only as related in somewhat sterile fashion through the plea taking process or through a printed narration in the pre-sentence report. The sentencing following a trial upon the merits, on the other hand,

2. Beyond this, a defendant who elects to acknowledge responsibility and plead guilty "demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary." *Brady* v. *United States*, 397 U.S. 742, 753 (1970). Such a defendant has "taken the first and arguably essential step toward rehabilitation and would therefore require less lengthy confinement and treatment than a defendant similar in all other respects but adamant in his protestations of innocence." J. Bond, *Plea Bargaining and Guilty Pleas* § 2.7(c), at 2-22 (1983). "It is almost axiomatic," one court has observed, "that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault * * *." *Gollaher* v. *United States*, 419 F.2d 520, 530 (9th Cir.), cert. denied, 396 U.S. 960 (1969).

For that reason, this Court's cases "unequivocally recognize the constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstated those attributes on which leniency is based." *Corbitt* v. *New Jersey*, 439 U.S. 212, 224 (1978) (footnote omitted). Accord *Brady*, 397 U.S. at 753. The lower federal courts have likewise held that "[a] genuine admission of guilt may properly result in a lighter sentence than would be ap-

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sees the trial judge in possession not only of more of the detailed facts of the offense itself, but of the flavor of the event and the impact upon any victims. It is for that reason a more real and accurate appraisal of the circumstances which brought the defendant to the bar of justice, and almost inevitably this added knowledge will affect the judge's consideration of what penalty appears most appropriate. This can, of course, work to the benefit or the detriment of the defendant according to the degree of culpability shown by the proofs.

propriate for an intransigent and unrepentent malefactor." *United States* v. *Stockwell*, 472 F.2d 1186, 1187 (9th Cir.), cert. denied, 411 U.S. 948 (1973). A trial judge is therefore entitled "to take into account the difference in mental attitude between the defendant who admits his guilt and seeks to reform and the defendant who, although proved guilty beyond a reasonable doubt, gives no indication of his willingness to be rehabilitated." *United States* v. *Derrick*, 519 F.2d at 4. Thus, although "[a]n accused may not be subjected to more severe punishment for exercising his constitutional right to stand trial" (*United States* v. *Carter*, 804 F.2d at 513; accord *United States* v. *Hutchings*, 757 F.2d 11, 14 (2d Cir.), cert. denied, 472 U.S. 1031 (1985)), a court may impose a lighter sentence when it concludes, based on a defendant's guilty plea and allocution, that he has accepted responsibility for the offense (see, *e.g.*, *United States* v. *Sampol*, 636 F.2d 621, 678 (D.C. Cir. 1980)). See generally *Roberts* v. *United States*, 445 U.S. 552 (1980).[8]

In the federal system, the Sentencing Guidelines explicitly approve that principle. Section 3E1.1(a) of the Guidelines and the accompanying commentary provide that although a defendant who pleads guilty is not entitled to a sentencing reduction "as a matter of right," the plea "may provide some evidence of the defendant's acceptance of responsibility" and may therefore justify a

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[8] See also American Bar Association Project on Minimum Standards for Criminal Justice, *Pleas of Guilty* § 1.8 and commentary at 36-52 (Approved Draft, 1968). In addition to reflecting a measure of contrition, a plea of guilty also permits prompt and certain, and therefore more effective, punishment. That, in turn, may further justify a reduction in the severity of the punishment. See Becker, *Crime and Punishment: An Economic Analysis*, 76 J. Pol. Econ. 169, 177-178 (1968); Bentham, *Principles of Penal Law*, Pt. II, Bk. 1, ch. 6, in 1 *Bentham's Works* 401 (Bowring ed. 1843).

reduction in the offense level on which the sentence will be based. *Sentencing Guidelines* § 3E1.1.(a), (c), Commentary at 3.21 (Jan. 1988). The Guidelines explain that "a defendant who clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense * * * is appropriately given a lesser sentence than a defendant who has not demonstrated sincere remorse." *Id.* at 3.22.

Because a trial court may lawfully give a lesser sentence to a defendant who pleads guilty, a reviewing court should not presume vindictiveness simply because a trial court has given a harsher sentence to a defendant who elects to go to trial. The rule in *Pearce* was not designed to preclude sentencing courts from taking into account a defendant's willingness to accept responsibility for his offense.

3. These first two principles suggest a third, more general one: a presumption of vindictiveness in this context is fundamentally incompatible with the accepted role of plea bargaining in the criminal justice system. "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system." *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977). As this Court has repeatedly explained, the "[d]isposition of charges after plea discussions is not only an essential part of the [criminal justice] process but a highly desirable part for many reasons." *Santobello* v. *New York*, 404 U.S. 257, 261 (1971). "For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof." *Brady* v. *United States*, 397 U.S. 742, 752 (1970).

The decision below is incompatible with a rational plea bargaining system. As Justice Maddox explained in dissent, under the majority's view a defendant would be "allowed to receive sentence concessions in return for a guilty plea and then, after a successful attack on that plea, bind the State to its original sentencing bargain if he is later convicted after a trial" (Pet. App. 14). Such an approach "would encourage gamesmanship of a most offensive nature"—what the Second Circuit has called "nothing more than a 'heads-I-win-tails-you-lose' gamble." *United States ex rel. Williams* v. *McMann*, 436 F.2d 103, 106-107 (1970), cert. denied, 402 U.S. 914 (1971). The original sentence would thereby become the defendant's baseline, and he could "go to trial and chance an acquittal knowing he could receive a sentence no harsher than he was originally given" (Pet. App. 14).

Nothing in this Court's cases requires the plea bargaining system to absorb such costs. To the contrary, the Court has repeatedly held that a presumption of vindictiveness is inappropriate where plea negotiations are involved. Thus, in *Bordenkircher* v. *Hayes*, 434 U.S. 357 (1978), the Court held that it was permissible for the prosecutor to threaten the defendant with increased charges if the defendant did not plead guilty, and to follow up on that threat when the defendant insisted on his right to stand trial. At the pretrial stage of the prosecution in which the prosecutor engaged in "give-and-take negotiation common in plea bargaining" (*id.* at 362), the Court found no element of improper "punishment or retaliation" (*id.* at 363). The Court recognized that the prosecutor has

a legitimate interest at the bargaining table in persuading the defendant "to forgo his right to plead not guilty" (*id.* at 364).

Similarly, in *Corbitt* v. *New Jersey*, 439 U.S. 212 (1978), this Court upheld a state sentencing scheme that authorized more lenient sentences for defendants who pleaded guilty in homicide cases. The Court reiterated that the government has a "legitimate interest" (*id.* at 222) in encouraging guilty pleas and affirmed the "constitutional propriety of extending leniency in exchange for a plea of guilty and of not extending leniency to those who have not demonstrated those attributes on which leniency is based" (*id.* at 224). Since this differential penalty scheme served "the interest of the State in efficient criminal procedure" (*id.* at 220 n.9) and was not a "needless or arbitrary burden on the [exercise of] constitutional rights" (*id.* at 223), the Court found no occasion for a presumption of malice or vindictiveness. See also *United States* v. *Goodwin*, 457 U.S. 368 (1982).

These cases make clear that the government has a legitimate interest in encouraging guilty pleas by offering favorable terms that it does not make available to defendants who proceed to trial and are convicted. Just as the government may legitimately make a better offer to defendants who agree to plead guilty, it may also treat less favorably (but nevertheless nonvindictively) those defendants who are convicted at trial. The *Pearce* presumption has no place in that calculus.

C. Even If A Presumption Of Vindictiveness Were Appropriate, That Presumption Was Easily Overcome In This Case

The trial court in this case offered a persuasive explanation, other than vindictiveness, for increasing respondent's sentence on the burglary charge. It stated that "at the time

of the plea, [it] was aware * * * that only one sex act took place"; after the trial, the court noted, it became "aware that five separate sex acts occurred" (C.A. App. R-400). The Alabama Supreme Court held (Pet. App. 4), however, that respondent's sentence could not be increased on that basis. It reasoned that the trial court's "subjective observations" gleaned from the trial did not constitute objective "events subsequent to the [respondent's] first conviction." Accordingly, it held that under the *Pearce* case the trial court's explanation did not overcome the presumption of vindictiveness.

That is precisely the argument this Court rejected in *Texas* v. *McCullough*, 475 U.S. 134 (1986). The defendant in that case was convicted and sentenced by a jury to 20 years' imprisonment. The trial court then granted the defendant's motion for a new trial, and defendant was again convicted. This time, the defendant chose to be sentenced by the court, which imposed a sentence of 50 years. In revising the sentence, the court relied, in part, on certain testimony, not presented at the first trial, which showed that the defendant, rather than his accomplices, had slashed the throat of the victim. This Court held that the trial court's findings had overcome any presumption under *Pearce*. The Court acknowledged the language in *Pearce* stating that the presumption of vindictiveness may be rebutted with evidence of " 'conduct or events that occurred subsequent to the original sentencing proceedings' " (*id.* at 141 (citation omitted)). It explained (*ibid.*), however, that "[t]his language * * * was never intended to describe exhaustively all of the possible circumstances in which a sentence increase could be justified." Instead, the Court stated, the *Pearce* presumption may be overcome by any " 'objective information * * * justifying the increased sentence' " (*id.* at 142 (citation omitted)). Applying that principle, the Court held

that the trial court's findings—including, in particular, " '[t]he testimony of * * * two witnesses directly implicat[ing] the defendant in the commission of the murder in question and show[ing] what part he played in committing the offense' " (*id.* at 143 (citation omitted))—were sufficient to rebut any possible presumption of vindictiveness.

The present case is controlled by *McCullough*. Here, too, the trial court justified its increased sentences by referring to "new evidence about the [crimes] that was not presented" at the time of the guilty plea and was "hence never made known to the sentencing" court the first time around (475 U.S. at 136). Moreover, the trial court was able to take into account after the trial the defendant's attitude regarding the offense and his testimony in which he offered a alibi defense and charged that the police had obtained a false confession from him. Under the reasoning of *McCullough*, the trial court's findings amply rebutted any possible inference of vindictiveness.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed.

Respectfully submitted.

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QUESTIONS PRESENTED

I. Whether the presumption of vindictiveness established in *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), applies when the judge, whose error in sentencing the defendant after a guilty plea results in a reversal on appeal, imposes a longer sentence for the same offense after the defendant is reconvicted in a jury trial.

II. Whether evidence presented at a jury trial relating to commission of the crime, standing alone, may overcome the presumption of vindictiveness resulting when the same judge sentences a defendant, convicted after trial, to a sentence longer than he imposed when the defendant plead guilty for the same offense in his initial conviction, which was set aside on appeal because of the same judge's error in sentencing.

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STATEMENT OF THE CASE

In November 1985, a Montgomery County, Alabama Grand Jury indicted the Respondent, James Lewis Smith, for burglary, rape, and sodomy, all committed in the first degree on the same occasion. Smith agreed to plead guilty to the burglary and rape charges in consideration for the prosecutor's agreement to dismiss the sodomy indictment. (J.A. 4-5) They did not negotiate or agree upon any recommended sentence, and the judge was not involved.

At the January 6, 1986 hearing on the guilty plea, the State and the Respondent affirmed their plea agreement, whereupon the trial judge attempted to ascertain a factual basis for the guilty plea and its voluntary, intelligent, and knowing entry. In response to the judge's questions, Smith alternately was silent, spoke reluctantly, seemed confused, and otherwise manifested physical or mental difficulties which appeared to annoy the judge.[1]

---

[1] Smith's actions prompted the court reporter to note three times on the record the fact that Smith was swaying back and forth during the proceeding. The first instance resulted in this exchange involving the judge:

> THE DEPUTY [addressing the Defendant]: What is wrong with you?
>
> THE COURT: Nothing. You have to hold your own. Do you have any questions about this form?
>
> THE DEFENDANT: No sir.
>
> (J.A. 11)

When Respondent swayed for the third time, the Court's reaction was recorded thusly:

> THE COURT: You want to bring the jury around here? I am tired of putting up with him.
>
> MR. SMITH [Defendant's Counsel]: Let him get his breath.
>
> (Pause.)
>
> (Defendant sworn.)
>
> THE COURT: All right. Well, if something is wrong with him,

The sentencing hearing, held on January 17, 1986, began with a statement from the victim (J.A. 19) followed by statements from the judge concerning Smith's letters to him. These letters are not included in the Record and could not be found by Respondent's counsel in the trial court's files. That the letters influenced the judge is apparent from this colloquy at the sentencing hearing:

> THE VICTIM: Before this happened, we were very secure, you know. Like I said, we are all afraid. And we're afraid that if he gets out, he will do it again. And possible just to bother and bring harm to —
>
> THE DEPENDANT [apparently believing the victim was referring to a threat from him]: No, I didn't say that.
>
> [The judge's response was directed to the defendant in the first two sentences; thereafter, he spoke to the defendant's alleged girlfriend]
>
> THE COURT: Basically, that's what you said. You told me in a letter (p.R.22) you did it. He did it because of some of the pressure he had with his problems with you. (Pointing defendant's [sic] girlfriend.) That's what he is saying. And that's what you said in your letter. I have both of the letters. You wrote me. I have both of the letters. You wrote me and told me all about he suspected you of doing something. I believe you perhaps weren't, but he suspected that. That's why he did it, because he was

how did he get straight that quick?
(J.A. 12)

At the end of this proceeding, the judge ordered Smith's incarceration until the sentencing hearing, explaining to counsel: ". . . Mr. Smith, he is having a problem, and to prevent you from having a problem, I'm going to revoke the bond and do a pre-sentence report. He looks like he's trying to go out on you." (J.A. 18)

> having pressure with you. You want to read his letter?
>
> DEFENDANT'S GIRLFRIEND: Yes.
>
> THE COURT: I—you want to read it?
>
> DEFENDANT'S GIRLFRIEND: Yes.
>
> THE COURT: Okay. You go back there and sit down and read it. This is the one you wrote him. Right here. See, I have yours too. In that letter, you sort of understand why he did it because of the suspicions he had which, perhaps, were unfounded, but he, at least, had them. You go back and sit down there and read it.
>
> (p.R.23) MR. SMITH [Defendant's Counsel]: I'll be back. I need to call my office.
>
> (Pause.)
>
> THE COURT: Are you satisfied he did it now?
>
> DEFENDANT'S GIRLFRIEND: (Nods head to indicate the affirmative.)
>
> (J.A. 19, 20)

At the same sentencing hearing, the State successfully invoked the Habitual Offender Act[2] based on the

[2] Alabama's Habitual Offender Act, ALA. CODE § 13A-5-9 (1975), provides that upon conviction for a Class A felony, a defendant with one prior felony conviction must be punished by "imprisonment for life or for any term of not more than 99 years but not less than 15 years." Both first-degree burglary, ALA. CODE § 13A-7-5 (1975) and first-degree rape, ALA. CODE § 13A-6-61 (1975), are classified as Class A felonies, and, as such, are punishable by imprisonment "for life or not more than 99 years or less than 10 years." ALA. CODE § 13A-5-6 (1975). The use of a "deadly weapon" during the commission of a Class A felony mandates a prison term "not less than 20 years." ALA. CODE § 13A-5-6(a)(4).

Respondent's having been previously convicted of a felony.[3] Additionally, trial counsel for Smith sought, unsuccessfully, to have Respondent undergo a mental evaluation prior to sentencing.

> MR. SMITH [Respondent's trial counsel]: After talking to everybody, (p.R.26) he needs to go to Bryce's and be mentally evaluated. I don't know if he was in his right mind at the time of the offense when it was committed, or at the time that he pled guilty up here, based on that letter.
>
> THE COURT: You know he was in his right mind when he pled guilty.
>
> MR. SMITH: I know he almost fainted and he perspirated [sic] and his eyes rolled back in his head and all of that.
>
> THE COURT: I'm not saying he was faking, but if he wasn't in his right mind, he wouldn't have stood up here when he pled and then straighten up the way he did.

After refusing Respondent's request for a mental evaluation, the judge next rejected the State's recommendation of life sentences for the burglary and rape convictions; instead, he sentenced Smith to concurrent, thirty-year prison terms. Appearing to give some weight to the pre-sentence report (J.A. 26-35), which recommended concurrent, twenty-year terms, the judge explained his sentence:

> He has a lot of good letters. He overreacted to what he suspected his wife of doing. No way can I radicate

[3] Respondent's trial counsel did not have prior knowledge of the felony conviction relied upon by the State, but Respondent did acknowledge a prior conviction in Huntsville for "buying and receiving and concealing," adding, "I didn't know at the time even what a misdemeanor or felony was." (J.A. 21)

> [sic] that. I know the pain and mental problems he caused this woman, and without any more, I am going to sentence him to thirty years in the penitentiary.

One week after sentencing, on January 24, 1986, Smith filed Motions seeking to withdraw his guilty plea, and they were set for hearing on March 17, 1986.[4] Smith was the only witness at the hearing; he denied his guilt as well as the voluntariness of his guilty plea. (J.A. 49-58) The judge denied both Motions. (J.A. 56-58)

In an opinion now reported at 494 So.2d 182 (Ala.Cr.App. 1986), the Alabama Court of Criminal Appeals found reversible error in the trial court's acceptance of Smith's guilty plea without first advising him properly of the maximum sentences. The Court noted the "established rule" of due process "that the defendant must be informed of maximum and minimum possible sentences as an absolute constitutional prerequisite to acceptance of a guilty plea." *Id.*, citing *Boykin* v. *Alabama*, 395 U.S. 238 (1969). In Smith's case, the trial judge "only informed him of the minimum and maximum sentences for a first-time felony offender" and did not advise him of the increased sentences required upon conviction as a habitual offender. *Id.* at 184

The judge whose error caused a reversal of Smith's guilty pleas to burglary and rape received the cases on

[4] The Joint Appendix, prepared and filed before this Court's appointment of Counsel for Smith, reports March 17, 1986, as the filing date for Smith's Motion to Withdraw Guilty Plea. (J.A. 1) In fact, on January 24, Smith filed that Motion along with a Motion for New Trial, each alleging that his "mental and emotional disturbance" made his guilty plea involuntary. Certified copies of the two Motions, not included in the Record below, are filed in the Appendix to this Brief.

remand, granted the State's Motion to reinstate the sodomy indictment (R.426-428) and denied two recusal motions from Smith's new trial counsel. (J.A. 73) The first recusal motion expressed two bases for Smith's fear of vindictive sentencing:

> 1. The Honorable Charles Price has prior to this date taken a guilty plea from said defendant and heard substantive facts from the said defendant that would inflame and prejudice his ruling in a new trial.
>
> 2. The Honorable Charles Price has been in ex parte communications with the defendant prior to his former guilty plea, and said ex parte communications inferred a presumption of guilt by the defendant and as such, would highly prejudice objective rulings by the trial judge in said case.
>
> (J.A. 69)

In the second recusal motion, counsel observed:

> [t]he Defendant, after imprisonment, of course bonded with said trial judge by the United States Mail requesting a reversal on the guilty plea and a demand for a trial . . . Defendant is now before the same judge charged with the same indictments heretofore brought in this Court, and it is Defendant's fear that the Court, having expressed himself as aforesaid after a reconsideration of the previous sentence, will not, if required by a verdict or plea, impose an unbiased, non-prejudiced sentence based on facts and circumstances herein charged. (J.A. 71-72)

The jury trial for the three cases proceeded promptly after the judge declined to recuse himself, and on August 19, 1986, the jury convicted Smith on all charges. (R.459-461) He was sentenced on August 22, 1986, to concurrent life terms for the burglary and sodomy convictions and a consecutive prison term of 150 years on the

rape conviction. (J.A. 83-85) In an effort to justify the significant increase from the sentences imposed after Smith's initial conviction, the judge commented: ". . . since I did not hear all of the testimony during your plea and now at trial have heard all of the testimony . . . the court finds that it's proper to increase the sentence beyond that which was given to you on the plea bargain. (J.A. 82)

The Alabama Court of Criminal Appeals affirmed Smith's three convictions and his life sentences for burglary and sodomy but remanded the rape conviction for resentencing in accordance with the statutory maximum of "life or not more than 99 years." (J.A. 104) The Alabama Supreme Court did not review the sodomy and rape convictions but did reverse the Court of Criminal Appeals' opinion "affirming the judgment of sentence that enhanced [Smith's] sentence for burglary from 30 years to life imprisonment." (J.A. 108) Based upon its "clear" finding "that the trial judge increased the . . . sentence because of his subjective observations [at trial] and not because of any objective evidence of events subsequent to the . . . first conviction," the Court ruled the sentence enhancement unconstitutional:

> We adopt the language from *Rice* v. *Simpson*, 274 F.Supp. 116 (M.D.Ala. 1967), aff'd, 396 F.2d 499 (5th Cir. 1968), aff'd sub nom., *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), as the applicable rule in Alabama:
>
> > "There can be no increase in a sentence in a criminal case after the sentence is imposed . . . To deny such protection to convicted criminals who elect to exercise their post-conviction remedies and do so successfully is unfair discrimination and does nothing except to serve to limit the use of post-conviction proceedings in the Alabama state courts by prisoners. It denies the prisoner the

> protection of his original sentence as a condition to the right of his appealing his conviction or exercising his post-conviction remedies." 274 F.Supp. at 122.
>
> See, also, *Ex parte Tice*, 475 So.2d 590 (Ala. 1984).
>
> (J.A. 109)

Construing the holding in *Pearce*, the Court found it "abundantly clear that the authorization for an enhanced sentencing 'in light of events subsequent to the first trial' is an exception to the general rule that, absent such evidence, a sentence imposed at the first trial may not be enhanced upon reconviction at the second trial after the first conviction has been overturned on appeal and remanded for a new trial." (J.A. 110)

SUMMARY OF ARGUMENT

Essential to the vitality of due process in the criminal justice system is the concept of fundamental fairness, and its lifeblood is embodied by the corollary ideals of impartiality and objectivity. Its constitutional imperative—well established in criminal jurisprudence—is that the accused, cloaked with a presumption of innocence, be adjudged guilty and punished appropriately only by persons and evidence untainted by bias or illegality. When an accused chooses to acknowledge his guilt, he is no less entitled to the protections of due process in either the guilt or the penalty phases of adjudication. These basic principles must guide a fair analysis of the constitutional propriety of sentence enhancement for a defendant who is reconvicted at trial after his initial conviction is set aside because of a constitutionally defective guilty plea.

I.

North Carolina v. *Pearce*, 395 U.S. 711, 725 (1969), found within the Fourteenth Amendment's due process

clause a constitutional limitation on the enhancement of a reconvicted defendant's sentence: "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." While circumscribing this limitation on occasion, this Court has been consistent and clear in emphasizing that a defendant's right to post-conviction review may not be denied or deterred by the fact or fear of a sentence motivated by retaliation for his exercise of that right. Because of the practical problems inherent in proving actual vindictiveness, the due process right interpreted in *Pearce* applies if the record demonstrates a realistic likelihood of vindictiveness.

This case compels a finding of presumptive vindictiveness because the evidentiary indicators for the *Pearce* rule exist on this record. Additionally, a contrary finding portends judicial abuse in the sentencing process and a concomitant sacrifice of the defendant's due process right not to be convicted by a constitutionally deficient guilty plea; the rationale advanced for this trade-off of due process rights—a perceived threat to plea bargaining—is not logical or reasonable on this record.

All the recognized indicators of presumptive vindictiveness are recorded in this case: the same sentencing authority whose initial adjudication upon Smith's guilty plea gave him not only a personal stake but also an institutional interest in the outcome of Smith's appeal, consequent trial, and resentencing. Notwithstanding the trial judge's disclaimer of actual vindictiveness at resentencing, the realistic possibility of vindictiveness which made Smith apprehensive is strengthened by the judge's stated evaluation—at the initial sentencing—of his personal belief in Smith's guilt, based, in part, on ex parte letters to him, which were neither sanctioned by nor

disclosed to Smith's trial counsel. Upon sentencing Smith after his guilty plea, the trial judge's impartiality was permanently and effectively destroyed, rendering an unconstitutional taint on his resentencing after Smith succeeded in setting aside his guilty plea.

This Court should resist the solicitation from the State of Alabama and the United States Government to expand the constitutional inquiry generated from this specific factual context to a referendum on the plea bargaining system. The question presented is not whether a defendant withdrawing a guilty plea should expect and receive a more severe sentence after trial. Such a question is inappropriate for two reasons: first, it implies that a defendant who pleads guilty may withdraw the plea at will; second, it ignores the evil *Pearce* addressed, vindictive sentencing. If a guilty plea is set aside for failure to satisfy its constitutional prerequisites, penalizing the pleader for challenging that plea lawfully through post-conviction review channels provided by the State serves only to eviscerate the constitutional right he exercised. *Pearce* did not intend this result, and neither does it find sanction in this Court's caselaw articulating the reach of *Pearce*. The narrower focus for the Court in this case is whether the sentence imposed upon reconviction is a product of vindictiveness, which is either actual or reasonably perceived upon a record demonstrating a realistic likelihood of vindictiveness.

The State and the Government entreat this Court to validate a general rule permitting sentence enhancements following trials for defendants who secure reversals of initial convictions grounded on guilty pleas. Their unabashedly stated rationale is that leniency in sentencing upon a guilty plea is, by practice, policy, and theory, a benefit to which a defendant is no longer entitled if he

chooses to attack his guilty plea on any ground. The rule suggested is wholly inconsistent with the sanctity deservedly afforded rights elevated to constitutional stature, and its acceptance by this Court requires, for all practical effects, an abandonment of the due process right defined in *Pearce*, freedom from vindictive sentencing.

II.

Objectivity is the corollary of impartiality in the context of the fundamental fairness requisite for due process in the criminal setting. The focus shifts from the entity empowered to sentence to the information which may be lawfully considered in setting the sentence. In this connection, *Pearce* fashioned a prophylactic rule, requiring that reasons for "a more severe sentence upon a defendant after a new trial . . . be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." 395 U.S., 711, 726.

Smith's trial judge did not state *any* reasons for increasing, from thirty years to life, the burglary sentence presented for this Court's review. The only reasons stated relate to the enhanced sentences for rape and the life sentence for sodomy, neither included here for review; those reasons clearly show that he relied exclusively on information presented at trial concerning commission of the crime.

Considered from the perspective of its underlying objectives, *Pearce's* presumption of vindictiveness is not overcome by information of this character—first because it fails inherently to meet the standard of objectivity and, second because its consideration realistically threatens to encourage, or at minimum to mask, vindictive sentences. This Court's decision in *Texas* v. *McCullough*, 475 U.S.

134 (1986), did not declare a general rule permitting evidence at trial to influence the sentencing of a reconvicted defendant; instead, consistent with the objectives of *Pearce* therein reaffirmed, that decision should be interpreted as simply an acknowledgement that, in the case-by-case consideration of vindictive sentences, the totality of circumstances evident in each case may or may not permit a judge to consider some objective information presented at the trial. In this case, the totality of circumstances surrounding Smith's sentencing after conviction unmasks the vindictiveness which was the likely motivator for the greater sentences imposed.

ARGUMENT

I. A DEFENDANT WHOSE CONVICTION AND SENTENCE ARE REVERSED DUE TO AN INVOLUNTARY GUILTY PLEA MAY NOT BE CONSTITUTIONALLY RESENTENCED BY THE SAME JUDGE TO A LONGER PRISON TERM AFTER HE IS RECONVICTED IN A JURY TRIAL.

A. The Realistic Likelihood Of Vindictiveness Warrants The *Pearce* Presumption When The Judge Whose Error Resulted In Reversal Of Defendant's Guilty Plea And Conviction Resentences Him To A Longer Prison Term After Trial and Reconviction.

The *Pearce* opinion identified two evils of equal significance in the analysis of constitutional restraints on sentencing—actual vindictiveness and apprehension of vindictiveness:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of

> such a retaliatory motivation on the part of the sentencing judge. 395 U.S. 711, 725.

In *Blackledge* v. *Perry*, 417 U.S. 21, 27 (1974), the Court affirmed "the lesson that emerges from *Pearce*, *Colten*, and *Chaffin*[5] . . . that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only by those that pose a realistic likelihood of vindictiveness." This standard remains intact and the Court's caselaw developing this lesson provides guidelines to determine the realistic likelihood of vindictive sentencing.

First, the Court has been disinclined to find presumptive vindictiveness when the record before the Court disclosed varying sentences by different authorities. *See Texas* v. *McCullough*, 475 U.S. 134, 140-141 (1986); *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 26 (1973); *Colten* v. *Kentucky*, 407 U.S. 104, 116-117 (1972). When different sentences are involved, the Court explained in *Colten*:

> [i]t may often be that the [second sentencer] will impose a punishment more severe than that received from the [first]. But it no more follows that such a sentence is a vindictive penalty for seeking a [new] trial than that the [first sentencer] imposed a lenient penalty. *Id.* at 117.

In Smith's case the judge who sentenced him after he plead guilty is the same judge who sentenced him when he was tried by jury and reconvicted for the same crime after successfully challenging his first conviction. The hazard of vindictiveness which inheres in this fact is enhanced here by the presence of two other hazards deemed relevant by

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[5] *Colten* v. *Kentucky*, 407 U.S. 104 (1972) and *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973).

this Court: affirmative evidence of the sentencing judge's ***personal*** motivation and his ***institutional*** motivation to impose a retaliatory sentence. These hazards were highlighted in *Chaffin* in order to illustrate the diminished possibility of impropriety in jury sentencing rather than judicial sentencing:

> . . . the jury, unlike the judge who has been reversed, will have no personal stake in the prior conviction and no motivation to engage in self-vindication. Similarly, the jury is unlikely to be sensitive to the institutional interests that might occasion higher sentences by a judge desirous of discouraging what he regards as meritless appeals. 412 U.S. 17, 27.

In the context of jury sentencing followed by judicial sentencing upon reconviction, *Texas* v. *McCullough* found no factual basis for a presumption of vindictiveness because, in part, the sentencing judge "had no motivation to engage in self-vindication," thereby precluding any "justifiable concern" about the judge's institutional interests. 475 U.S. 134, 139.

Markedly different on the record in this case is the actual involvement of Smith's trial judge, even before Smith's initial sentencing. Incarcerated pending sentencing after his guilty plea, Smith wrote letters to the judge in an apparent effort to explain his conduct and encourage a lenient sentence. The specific content of the letters is not detailed on the record, but the judge's comments concerning them at Smith's first sentencing hearing leave little doubt that he read these ex parte communications and found them incriminating.

When Smith interrupted the victim's comments and disputed her stated fear that "if [Smith] gets out, he will do it again," the judge used Smith's letters to corroborate

the victim's statement. First, he pointedly reminded Smith:

> "Basically, that's what you said. You told me in a letter you did it." (J.A. 19)

Next, the judge insisted that Smith's alleged girlfriend read Smith's letter, and his intent to have her as satisfied as he was of Smith's guilt is reflected in his question to her after she read the letters: "Are you satisfied he did it now?" (J.A. 20)

Just prior to sentencing Smith, the judge gave another indication of his influence by Smith's letter:

> ". . . You just have to know how to control your problems. And from reading your wife's letter and your letter, you may have been overreacting to what you suspected . . ." (J.A. 22)

The judge's clearly expressed reliance on Smith's letters in sentencing him on January 17 makes almost incredulous his strenuous denial nearly seven months later that the letters affected adversely the fact or appearance of his impartiality. After Smith's conviction was vacated and remanded for trial, the judge denied motions to recuse himself, explaining to Smith's new trial counsel:

> MR. CASON: Your Honor, our client, based on the fact that he gave a prior guilty plea and conferred with the court as to the substantive issues evolving around this particular case, the defendant has asked that the trial judge recuse himself from the case based on that former guilty plea and sentencing, and, also, based on the fact that he claims he did have ex parte with the trial judge by sending letters through the United States mail to the trial judge.
>
> THE COURT: That's not ex parte, because I get mail from people all the time—

MR. CASON: Yes, sir.

THE COURT: —From inmates; those that are charged, those that are not. I don't share those with anyone and really don't take much action on them.

(J.A. 73)

Though the questionable propriety of the trial judge's consideration of Smith's letters is not before this Court, the reality of their influence on the judge directly bears on the likelihood of a retaliatory motivation in his subsequent sentencing.[6] Convinced of Smith's guilt from his self-incriminating letters, the judge discredited himself, in effect, as an impartial, disinterested sentencing authority in any subsequent proceedings required to adjudicate his guilt. Thus, in the trial necessary after reversal of the first conviction, the judge could be viewed properly as an advocate for and protector of the institutional interests of judicial economy and efficiency in the resolution of criminal cases. Privy to facts inculpating Smith from two different sources—the guilty plea proceeding on the record and Smith's "off the record" letters, the judge may very well have considered Smith's trial a nuisance and a burden —personally and institutionally—and, at minimum, an unjustified accommodation for a once-repentant defendant now unwilling to accept the consequences of his admission of guilt. Powerless to undo Smith's success in voiding his conviction grounded on that admission, the trial judge could express his displeasure by enhancing Smith's sentence after conviction at trial, an act which would also communicate his discouragement to any other

[6] Indeed, it is reasonable to believe, as did Smith in moving for the judge's recusal, that a retaliatory motive might influence the judge's action on pre-trial and post-conviction motions, including motions for continuance and for a new trial. (J.A. 69, 70)

convicted felons considering appellate review of guilty pleas and convictions. This is precisely the evil *Pearce* addressed.

Whether the trial judge actually possessed this retaliatory intent is unnecessary to decide; the realistic possibility of his vindictive resentencing is affirmatively shown through facts and circumstances in support of Smith's plainly stated apprehension.

The personal interest of Smith's trial judge in his reconviction and resentencing is evidenced not only by acts depriving him of impartiality at the resentencing but also by his acts constituting reversible error in connection with Smith's initial guilty plea, conviction, and sentence. The opinion of the Alabama Court of Criminal Appeals which vacated Smith's guilty plea specifically documents the trial judge's errors in a manner reasonably likely to instill his motivation to engage in self-vindication.

That opinion first declared that "Smith was never informed of the proper sentences he could receive," 494 So.2d at 182, and next detailed the trial judge's mistakes in that connection. First, at the guilty plea proceeding on January 6, 1986, the judge accepted from Smith a guilty plea form which:

> "did not inform Smith that he would receive two separate sentences or that he would be sentenced as a habitual felony offender. Additionally, the form did not state the correct potential sentence for the first time conviction of a Class A Felony . . ." 494 So.2d at 183.

The trial judge erred again at the guilty plea hearing when he gave Smith, before accepting his guilty plea, an "instruction" that "does not satisfy the constitutional requirement that the accused be informed of the minimum

and maximum potential sentence and is misleading in that it affords the impression that the application of the Habitual Offender Act is discretionary." *Id.* at 183.

In connection with this misleading impression about the impact on Smith's sentencing of any prior felony convictions, the existence of which was not referenced at the guilty plea hearing, the trial judge compounded that mistake, in the opinion of the Alabama Court of Criminal Appeals, by advising Smith at sentencing:

> THE COURT: You [Smith] have a lot of good letters. And you have been in the penitentiary once, but not holding that against you, I will just let you know that. *Id.*

Finally, after the prosecutor produced a certified copy of Smith's prior conviction and requested his sentencing as a habitual offender, the judge neglected to tell Smith that Alabama law required him to "hold against [him]" the prior conviction by increasing his maximum, potential sentence.

All these judicial errors deprived Smith's guilty plea of its "absolute constitutional prerequisite"—"that the defendant . . . be informed of maximum and minimum possible sentences." *Id.* at 182, citing *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

Smith's trial judge had reason to be chagrined by the reviewing court's characterization of "the confusion in the circuit court" and by its reluctant remand of the case:

> "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Boykin*, 395 U.S. at 242, 89 S.Ct. at 1711. Under these circumstances, this Court has no alternative but to reverse the judgment of the circuit court and remand this cause for further proceedings. *Id.* at 184.

Pearce's presumption of vindictiveness is, therefore, appropriately applied in this case to guard against the realistic likelihood of vindictive sentencing against Smith, whose exercise of post-conviction review rights exposed judicial error of reversible magnitude on a well-defined subject in constitutional jurisprudence.

B. A Defendant Convicted After A Guilty Plea Is No Less Entitled Constitutionally To Freedom From Vindictive Resentencing By A Judge Whose Error In The Initial Sentence Required A Reversal Of That Conviction.

The State of Alabama, forcefully supported by the Government as amicus curiae, contends that *Pearce's* presumption of vindictiveness should not apply in the context of reconviction following a withdrawn guilty plea: "To apply the presumption of a post-plea-bargain situation," the State contends, "would totally destroy the plea bargaining system." (Brief of Petitioner at 14) Foretelling a similar doom for that system in federal criminal practice, the Government suggests that it is "entirely legitimate" to treat differently a defendant who has pleaded guilty—who "may well deserve a more lenient sentence"—and one who has gone to trial and "may well not have earned specially lenient sentencing treatment." (Brief for the United States at 8)

While this contention unnecessarily broadens the question presented in this case, it also equates improperly valid policy concerns about a practice which—while sanctioned by this Court—is not a constitutional right, with this Court's constant vigilance to protect a recognized constitutional right. Lest this Court be tempted to adopt this spurious focus on the sanctity of plea bargaining, its

firmly established adherence to two basic, constitutional premises bear repeating here.

First and highly relevant is this Court's tradition of upholding a defendant's right not to be penalized by judicial error, particularly error of a constitutional magnitude. As Justice Stewart observed in writing for the *Pearce* Court:

> It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for having succeeded in getting his original conviction set aside. *Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such punishment, "penalizing those who choose to exercise" constitutional rights "would be patently unconstitutional." United States* v. *Jackson*, 390 U.S. 570, 581, 20 L.Ed.2d 138, 147, 88 S.Ct. 1209 . . . But even if the first conviction has been set aside for nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law." 395 U.S. at 724 (emphasis added)

The second constitutional premise relevant to the Petitioner's contention is that a guilty plea, because it involves the waiver of several constitutional rights, must satisfy constitutional prerequisites. Due process requires that a guilty plea be a voluntary, knowing, and intelligent act "done with sufficient awareness of the relevant circumstances and likely consequences," including the "maximum and minimum possible sentences." *See Brady* v. *United States*, 397 U.S. 742, 748 (1970) and *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969).

Applied to Smith's case, these principles are accompanied by undisputed facts: first, Smith's guilty plea was defective based on constitutional error by the judge who accepted the plea; second, Smith had a protected right to challenge the constitutional propriety of his guilty plea and conviction.

Smith did not simply withdraw or repudiate a plea agreement, as suggested by the Petitioner's argument. In fact, after the trial court accepted the plea agreement—Smith's guilty plea to burglary and rape and the State's dismissal of the sodomy indictment—Smith had neither a statutory nor a constitutional right to repudiate the agreement merely because he had changed his mind or did not like the sentence. The agreement was final subject only to its satisfaction of the constitutional prerequisites for voluntariness and intelligence, and Smith never relinquished his right to appellate review of these constitutional prerequisites. To hold otherwise is to deprive defendants who plead guilty of any due process protections for their convictions while according such protections to defendants convicted after trial; such a distinction is neither rational nor right.

Smith should not be compelled by virtue of his guilty plea to forfeit one due process protection—a constitutionally valid guilty plea—in order to secure another—a sentence free from vindictiveness. If he risks the latter by exercising constitutional rights to secure the former, he is thereby deprived of the essence of due process in the criminal process, fundamental fairness. That significant deprivation is not justified by the perceived need to accommodate plea bargaining, however salutary its goals. Indeed, in this case, the State did not lose any benefit from its bargain; it agreed to dismiss one charge if Smith plead guilty to two others. Subsequent to reversal of

Smith's plea, the State regained its former position by reinstating that charge.

II. EVIDENCE PRESENTED AT TRIAL RELATING TO COMMISSION OF THE CRIME, STANDING ALONE, IS NOT SUFFICIENT IN THIS CASE TO OVERCOME THE PRESUMPTION OF VINDICTIVENESS.

Pearce's prophylactic rule is clearly stated:

> [w]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal. 395 U.S. at 726.

Smith's trial judge did not state any specific reasons for enhancing the burglary sentence, and his general explanation for his overall sentencing relates to evidence presented at Smith's trial:

> When you entered your plea, you told me your side of the story. And of course, now that the court has had a trial and heard all of the evidence. . .
>
> ***
>
> But under North Carolina versus Pearce . . ., the court finds that since I did not hear all of the testimony during your plea and now at trial have heard . . . all of the testimony which consisted of raping the victim at least five times, and after the second or third time, then causing her to perform oral sex on you, and then of course, at least raping her one or two more times after that, threatening her life with the knife and all, after looking at this matter, and your

> mental outlook on it and your position during the trial and what you said, the court finds that it's proper to increase the sentence beyond that which was given to you on the plea bargain. (J.A. 82)

The Alabama Supreme Court deemed these reasons deficient under *Pearce* because "it is clear that the trial judge increased the petitioner's sentence because of his subjective observations and not because of any objective evidence of events subsequent to [Smith's] first conviction. (J.A. 109) This court should affirm that holding for three reasons:

1. The Standard Of Objectivity Is Absolutely Essential For Due Process.

Any abandonment or diminution in the requirement of objectivity is unfathomable and would constitute a giant step backwards in this Court's commitment to guarantee an accused a fundamentally fair trial. Consistent with the highest aims of due process is a requirement that information admissible to affect the defendant's guilt or his penalty be limited to facts, conditions, or circumstances perceived and applied without distortion by personal feeling, prejudices, or interpretations.

Though the decision reflected some retreat from a literal interpretation of the *Pearce* rule, *Texas* v. *McCullough* reaffirmed this Court's insistence on the standard of objectivity:

> Perhaps then the reach of *Pearce* is best captured in our statement in *United States* v. *Goodwin*, 457 U.S. at 374, 73 L.Ed.2d 74, 102 S.Ct. 2485:
>
> > "In sum, the Court [in Pearce] applied a presumption of vindictiveness, which may be overcome only by objective information . . . justifying the increased sentence." 475 U.S. at 142.

2. The Information Considered By The Trial Judge Does Not Satisfy The Standard Of Objectivity.

The trial judge's stated reasons for enhancing Smith's sentence lack objectivity, in part, because they inaccurately summarize the actual testimony. The victim did not testify that her life was threatened with a knife. Though her attacker "came running towards [her] with the knife in his hand" (R.134), she testified that "he kept saying that I'm not going to hurt you or I'm not going to hurt your children." (R.136) In fact, the victim's testimony disclosed that the knife was not always in her attacker's hands during the course of the assault:

> He had the knife sometimes in his hand, and he had laid the knife on the bed, and at one time, he had placed the knife in my hand. (R.138) . . . He said, see, here's the knife. He got the knife and he placed it in—I had my hand extended out, so he put the knife in my hand and folded my hand over the knife and brought it up to his chest. He said, see, you've got the knife; go ahead and kill me. And I told him that I couldn't kill him. (R.140)

The judge's statement of the evidence on this one issue highlights the subjectivity inevitable in having the sentencing authority evaluate testimony presented in a jury trial, a difficult task even for the assigned trier of fact. Here, Smith, who denied being the attacker, gave testimony in direct contradiction to the victim's. The jury—presumably bereft of personal bias or prejudice grounded on prior knowledge of the crime, the accused, or the victim—had the duty to reconcile conflicting testimony but was aided by the usual jury instructions designed specifically to make that process as objective as possible; those objective guidelines relate, for example, to permissible inferences from the evidence, demeanor of a witness and his interest in the outcome, presumptions,

and burdens of proof. (R.352-365) Unlike any of the twelve jurors, however, the judge did not listen to the testimony at trial untainted by personal bias or prejudice grounded on prior knowledge of the crime, the victim, or the accused. His objectivity was significantly impaired, if not wholly destroyed, by his conduct of the guilty plea proceeding, his admitted consideration of ex parte letters implicating the defendant[7], and his conduct at defendant's first sentence hearing, which included an inexplicable but successful effort to demonstrate the defendant's guilt to his alleged girlfriend. Under these circumstances, the trial judge's purported reliance on testimony detailing the crime is precisely the type of sham that conveniently masks vindictiveness.

What the judge failed to say, in explaining the enhanced sentences, is as significant to this analysis of objectivity as his actual statements. Contrary to the *Pearce* mandate of "factual data—made part of the record", he proffered no reason at all to explain enhancement of the sentence for burglary, which is the only sentence presented here for review. Since *Pearce* requires such reasons to "affirmatively appear" on the record, this Court has no basis for upholding the constitutional legitimacy of the burglary sentence.

Even if the judge intended to justify increasing the burglary sentence from 30 years to life by reference to trial testimony detailing the rape and sodomy also committed, and the use of a knife, reliance on this information is misplaced. Smith was tried and subject to separate punishment for burglary, rape, and sodomy; Alabama law

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[7] Since these letters are not a part of the Record, the judge's stated reliance on the testimony at trial is even more suspect, for they may have included the very details of the offense presented at trial.

provided that the use of a weapon, such as a knife, could enhance the prison term for any of the three offenses. Consequently, it is hardly defensible to justify Smith's greater sentence for burglary following his trial by referring to his commission of other crimes at the time of the burglary, a fact known to the judge well before the trial. The validity of such a justification is clear because this record discloses not only conviction for those other crimes but also sentencing by the same judge to the maximum, life term for one, and a 150-year sentence for the other.

When the judge sentenced Smith initially to a thirty-year prison term for burglary, he knew from the guilty plea proceeding that the assailant gained nighttime entrance to the victim's residence by cutting a screen with a knife and going through the window. (J.A. 13-16). At trial no evidence was offered which added any substantive details to the facts of the burglary. The victim gave no testimony relevant to the burglary other than to acknowledge that police officers pointed out to her the kitchen window as the assailant's point of entry (R.153), and that she did not invite the attacker to her residence or otherwise consent to the attack.

Testimony concerning the burglary from the state's second and final witness, police investigator Grin[illegible]ley, included no details not disclosed to the judge in connection with the first conviction. (R.183, 197)

In sum, the record is silent concerning any properly considered facts to explain an enhancement of Smith's burglary sentence from thirty years to life. More importantly from the standpoint of *Pearce's* rule, the sentencing judge offered no explanation to rebut the presumption of vindictiveness inherent in that sentence.

3. Preservation Of The Due Process Right Affirmed By *Pearce* Requires This Court To Reject A General Rule Permitting A Judge To Justify Increasing Sentences For Reconvicted Defendants Merely By Reference To Evidence At The Trial Concerning Commission Of The Crime.

Pearce required that the reasons for enhanced sentences after reconviction not only be objective but also concern "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." In *Wasman* v. *United States*, 468 U.S. 559, 569-570 (1984), the Court expanded the scope of "conduct of the defendant" by upholding an enhanced sentence which was based on "consideration of a criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial." Even though the conduct underlying the intervening criminal conviction had occurred and was disclosed to the judge at the initial sentencing, *Wasman* held that consideration of the conviction was "manifestly legitimate" and "amply rebuts any presumption of vindictiveness." *Id.*

In response to arguments that the plain language of *Pearce* established temporal limitations on the type of information to justify sentence enhancement, *Wasman* observed: "*Pearce* is not without its ambiguities . . . we find it unnecessary, however, to reconcile these apparent ambiguities." Instead, the Court's narrower holding rested on an opinion that "no logical support" exists "for a distinction between 'events' and 'conduct' of the defendant occurring after the initial sentencing insofar as the kind of information that may be relied upon to show a nonvindictive motive is concerned." *Id.* at 571-572.

Smith's case squarely presents the question implicit in the *Pearce* ambiguities not clarified by *Wasman:* may the

defendant's trial after reversal of a guilty plea be the source of the "events" or "conduct" used to justify a sentence greater than that imposed after the first conviction and, if so, may the details and flavor of the crime, presented at trial, constitute the criterion of "objective information." Contrary to arguments in brief from the State and the Government, *Texas* v. *McCullough* does not mandate a response in the affirmative.

This Court in *Texas* v.*McCullough* appeared reluctant to embrace a general rule elevating the testimony at retrial automatically to the stature of "objective information" sufficient alone to overcome the *Pearce* presumption:

> . . . we have restricted application of *Pearce* to areas where its "objectives are thought most efficaciously served," (citation omitted). Accordingly, in each case, we look to the need, under the circumstances, to "guard against vindictiveness in the resentencing process." (citation omitted) 473 U.S. at 138.

Even a cursory comparison of the factual contexts in this case and *McCullough's* highlights the wisdom of an approach which examines the need in the context of the totality of circumstances presented in each case. The need to guard against a vindictive resentence in Smith's case is compelling, in large part, because of the sentencing judge's demonstrated lack of impartiality. On the other hand, the court was impressed—based on the record—with the impartiality of the judge who imposed the enhanced sentence in *McCullough*, noting that (1) a jury rather than the judge imposed the initial sentence, (2) the judge granted the convicted defendant's motion for a new trial, finding merit in his claim of prosecutorial misconduct, and (3) the defendant, upon retrial, chose to be sentenced by the judge rather than the jury. *Id.* at 139. A

finding of presumptive vindictiveness, on these facts—none of which coalesce in Smith's case—was not deemed appropriate.

The *McCullough* Court's discussion of the evidence permissible to rebut vindictiveness (*Id.* at 141-144) must first be viewed in the context of its specific finding that *Pearce's* presumption of vindictiveness did not apply. The Court did note approvingly the judge's "careful explanation . . . for the sentence imposed," and the explanation included reliance "on the testimony of two new witnesses which she concluded (with "specific findings") "had a direct effect upon the strength of the State's case at both the guilt and punishment phases of the trial." However, even though this Court characterized such testimony as "objective information . . . justifying the increased sentence," it noted other "objective information" in the form of a finding that McCullough committed the crimes within four months of his release from prison. *Id.* at 144.

When the presumption of vindictiveness, not found in *McCullough*, does apply, there is sound reason for analyzing the overall circumstances of the case before permitting the judge to justify an increased sentence by reliance solely on information from the trial. If, as in Smith's case, the judge records an explanation which only generally refers to having "heard all of the evidence" and specifically relates only the details and flavor of the crimes which resulted in the sentences not presented for appellate review, he has not complied at all with the *Pearce* rule, and an appellate tribunal has no basis to determine the constitutional legitimacy of the enhanced sentence in controversy.

Moreover, a carte blanche rule which permits sentence enhancement to be justified solely by conduct or events

disclosed at trial creates much too convenient a mechanism for masking a vindictive sentence and thereby poses a realistic likelihood that the constitutional right to a nonvindictive sentence will be meaningless in that the trial judge may routinely explain his sentence by reference to the trial, which will indisputably furnish many more details about the offense and, frequently, much more information about the accused and the scope of his participation in the crime. As one commentator cautioned: "If a court on retrial could justify an increased sentence on the ground that it now had additional knowledge concerning the defendant's participation in the offense, then the *Pearce* limitation could be evaded in almost every case." 3 W. LaFave & J. Israel, *Criminal Procedure* § 26.1 at 176 (1984)

Acknowledging the difficulties of proving actual vindictiveness, the need to minimize the defendant's reasonable apprehension of vindictiveness, and the realistic likelihood that an overly broad reading of *Pearce* will facilitate the masking of vindictiveness, the federal appellate courts have struggled to fashion not an absolute rule but a fundamentally fair result weighing all the relevant circumstances, an effort consistent with the case-by-case "need" analysis suggested by *McCullough*. See, e.g., *United States* v. *Gilliss*, 645 F.2d 1269, 1281-1284 (8th Cir. 1981) and *United States* v. *Bello*, 767 F.2d 1065, 1068-1069 (4th Cir. 1985)[8]

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[8] The appellate court cases cited by the State (Brief of Respondent at 24) and the Government (Brief for the United States at 13, n.5) do not support the suggestion of "near uniformity" on the specific issue posed on this record. In *McKenzie* v. *Risley*, 842 F.2d 1525, 1536-1537 (9th Cir. 1988) and *Thompson* v. *Lynaugh*, 821 F.2d 1054, 1064-1065 (5th Cir. 1987), both capital cases presenting several issues for habeas review, the sentencing issue was grounded upon plea negotiations and proposals rather than the implemented plea bargain in Smith's case. Similarly, the habeas petitioner in *Hitchcock* v. *Wainwright*, 770 F.2d 1514 (11th Cir. 1985) contended that the trial court, in imposing a death sentence, improperly considered his refusal to plead guilty in a plea bargain offered by the prosecutor and the judge. The defendant in *United States* v. *Carter*, 804 F.2d 508, 510; 513-515 (9th Cir. 1986) was allowed to withdraw his guilty plea when the trial judge, on the day of sentencing, demanded that restitution be included as a part of the agreement. In *United States* v. *Townsend*, 796 F.2d 158 (6th Cir. 1986), the defendant was allowed by this trial court, for reasons not reported, to withdraw his guilty plea. Finally, the defendant in *Frank* v. *Blackburn*, 646 F.2d 873 (5th Cir. 1980) rejected an offered plea bargain which included a recommended sentence.

CONCLUSION

The judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT OF 15TH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA

Case No.: CC-85-1684-PR

(Caption omitted in printing)

FILED: January 24, 1986

MOTION FOR NEW TRIAL

Comes now the Defendant by and through his Attorney of record and moves this Honorable Court to grant the Defendant a new trial in this case. The Defendant respectfully represents that he plead guilty to the crimes of Burgulary I and Rape I on January 6, 1986 in this Court. Subsequent to that on January 17, 1986, he was sentenced to thirty years in the penitentiary concurrent on each case. The Defendant respectfully requests that this Honorable Court grant him a new trial for the following reasons:

1. The Defendant was under an extreme emotional and mental and mental disturbance at the time of these pleas and they were not voluntary.

2. Based upon this mental and emotional disturbance by the Defendant, he was coerced into entering this guilty plea and the Court should have recognized based upon this disturbance that this plea was not voluntary and knowingly made.

3. The Defendant has a Motion to Withdraw the guilty plea pending in this case.

4. Based upon the above, the Defendant respectfully requests this Honorable Court set this matter down for a new trial at its earliest convenience.

Respectfully submitted,
/s/Elno A. Smith
ELNO A. SMITH
Attorney for Defendant

(Certificate of service omitted in printing)

IN THE CIRCUIT COURT OF 15TH JUDICIAL CIRCUIT
MONTGOMERY COUNTY, ALABAMA

Case No.: CC-85-1684-PR

STATE OF ALABAMA

v.

JAMES L. SMITH

FILED: January 24, 1986

MOTION TO WITHDRAW GUILTY PLEA

Comes now the Defendant by and through his Attorney of record and moves this Honorable Court to allow him to withdraw the guilty plea entered in this case on to-wit January 6, 1986. The Defendant plead guilty the crimes Burgulary I and Rape I and when sentenced on January 17, 1986, thirty years in the penitentiary on each case to run concurrently.

The Defendant cites that at the time of the guilty plea on January 6, 1986, he was undergoing an extreme mental and emotional breakdown. He further represents that he did not know the nature of the crime nor could he knowingly waive his rights to a trial. The Defendant represents to the Court that the plea was not voluntary because of his mental condition and as a result, he should be allowed to withdraw it and have this matter set down for a trial by jury.

The Defendant respectfully requests this Honorable Court allow him to withdraw his guilty plea or in the alternative, to order the transcript in this case be immediately prepared so the record will reflect the involuntariness of these guilty pleas and show the Court that these pleas were not done knowingly and voluntarily by the Defendant. The Defendant respectfully requests this Honorable Court set this matter down for a hearing at its earliest convenience.

Respectfully submitted,

/s/Elno A. Smith
ELNO A. SMITH
Attorney for Defendant

(Certificate of service omitted in printing)

Supreme Court, U.S.
FILED
APR 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-333

In The

Supreme Court of the United States

October Term, 1988

STATE OF ALABAMA,

Petitioner,

vs.

JAMES LEWIS SMITH,

Respondent.

On Writ Of Certiorari To The Alabama Supreme Court

REPLY BRIEF OF PETITIONER

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ARGUMENT

I.

PEARCE'S PRESUMPTION SHOULD NOT APPLY TO RESENTENCING FOLLOWING A WITHDRAWN GUILTY PLEA.

Respondent fails to distinguish between the principle stated in *North Carolina v. Pearce*, 395 U.S. 711 (1969), that a defendant may not be punished by a trial judge for having succeeded in getting his first conviction set aside, and the presumption of vindictiveness adopted in *Pearce*, that any increased sentence on retrial is unlawful unless the trial judge affirmatively justifies it. The principle stated in *Pearce* is a "basic due process protection," *Michigan v. Payne*, 412 U.S. 47, 50 (1973), but the presumption adopted in *Pearce* is a "prophylactic rule," *Colten v. Kentucky*, 407 U.S. 104, 116 (1972), designed "to guard against the possibility of vindictiveness in the resentencing process." *Payne*, 412 U.S. at 51. That distinction is important because that presumption is an exception to the traditional rule that a sentencing judge had broad discretion and may consider a wide range of evidence, *Mistretta v. United States*, 109 S. Ct. 647, 650 (1989); *Williams v. New York*, 337 U.S. 241 (1949), and because that presumption, like other "judicially created rules to implement constitutional guarantees," should be "tailor[ed]" to those situations in which it is necessary. *Texas v. McCullough*, 475 U.S. 134, 142 n.4 (1986).

Respondent argues that it is appropriate to presume that the trial judge acted vindictively in this case because the facts of this case suggest that he did. Resp. Br. 14-22.[1]

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[1] Because counsel for petitioner has not yet received printed copies of respondent's brief, citations to respondent's brief are to the typescript version.

But the question whether a presumption of vindictiveness is appropriate does not hinge on the facts of a particular case. It turns on the question whether in the generality of cases a trial judge is likely to act vindictively when resentencing a defendant who has succeeded in having his guilty plea set aside. A presumption is an evidentiary device allowing the trier of fact to treat proof of a basic fact (*A*) as tantamount to proof of an ultimate fact (*B*) because, as a matter of experience, proof of that basic fact renders so likely the existence of the ultimate fact that it is both sensible and efficient to treat the latter as having also been proved until an adversary disproves it. *McCormick on Evidence* 807 (2d ed. E. Cleary 1972); *Ulster County Court v. Allen*, 442 U.S. 140, 157-160 (1979). When that presumption is mandatory, as it is under *Pearce*, the validity of that presumption is "logically divorced" from the facts of a particular case and instead rests on "the presumption's accuracy in the run of cases." *Allen*, 442 U.S. at 159 (footnote omitted). This court made that point in *United States v. Goodwin*, 457 U.S. 368 (1982). There, in deciding whether the prosecutor acted vindictively in filing new charges after the defendant asked for a jury trial, the Court noted that, since there was no evidence of actual vindictiveness, "[t]he conviction in this case may be reversed only if a *presumption* of vindictiveness – *applicable in all cases* – is warranted." 457 U.S. at 381 (emphasis in original and added).

A presumption of vindictiveness is unjustified in a case such as this one because of both the practice of plea bargaining and the prospect that a trial will reveal previously unknown facts bearing on the defendant's culpability. In *Corbitt v. New Jersey*, 439 U.S. 212 (1978), the

Court upheld a sentencing scheme that offered a prospect of leniency to a defendant who pleaded guilty, and rejected the argument that doing so improperly penalizes a defendant who stands trial.[2] And in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the Court recognized that, if the state may be lenient to a defendant who pleads guilty, then the state may deny leniency to a defendant who instead elects to stand trial. Those principles are equally applicable here. Moreover, trials often reveal facts that bear on the heinousness of the crime and the incorrigibility of the defendant, both of which are legitimate sentencing considerations. *Spaziano v. Florida*, 468 U.S. 447, 466-467 (1984); *United States v. Grayson*, 438 U.S. 41, 50-55 (1978). There is no reason to assume that that information will always be available to the sentencer following a guilty plea.

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[2] In *Simpson v. Rice*, the companion case to *Pearce*, the defendant had pleaded guilty at his trial and was sentenced to ten years' imprisonment. After that judgment was set aside on the ground that Rice was not represented by counsel at the time of his original pleas, Rice pleaded not guilty at his retrial, was convicted, and was sentenced to 25 years' imprisonment. Thus, it could be argued that *Pearce* holds that a defendant's decision to change his plea from guilty to not guilty can never be a basis for increasing his sentence. But the factual context of that case indicates that *Pearce* should not be read so broadly. The Court did not consider whether the leniency of the first sentence on account of a guilty plea could justify the increase because the prosecution made no effort to justify the substantial increase in Rice's sentence. *Simpson v. Rice*, 274 F. Supp.

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II.

THE FACTS CONSIDERED BY THE TRIAL COURT SUFFICIENTLY REBUT *PEARCE*'S PRESUMPTION.

Even if a presumption of vindictiveness applies when the same trial judge resentences the defendant after he has withdrawn his guilty plea, that presumption is rebuttable by a variety of different types of evidence. *McCullough*, 475 U.S. at 141 (the presumption can be rebutted by the discovery of evidence showing that the defendant has a prior criminal record); *id.* at 143 (the presumption can be rebutted by evidence at trial showing that the defendant played a more substantial role in the crime, and was therefore more culpable, than was evident from the proof at the first trial); *id.* at 144 (the presumption can be rebutted by the new evidence that the

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116, 121-122 (M.D. Ala. 1967), aff'd on the basis of the district court's decision, 396 F.2d 499 (5th Cir. 1968), aff'd *sub nom. North Carolina v. Pearce*, 395 U.S. 711, 726 (1969). Thus, this Court was entitled to rely on the district court's finding that the sentence was in fact vindictive. Significantly, Justice Black, who argued vigorously that a defendant's change of plea could, as a general rule, justify a less lenient sentence, *id.* at 742-743, stated that he would nonetheless affirm in *Rice* on the basis of the district court's factual finding of the existence of a retaliatory motivation, *id.* at 739. Since *Pearce*, *Corbitt* held that a trial court may extend leniency to a defendant who pleads guilty, which also indicates that *Rice* should not be read broadly. Finally, at the time that *Pearce* was decided, this Court had not yet ruled on the legitimacy of imposing a harsher penalty on a defendant who refuses to plead guilty, see *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), which also counsels against a broad reading of the *Rice* case. Cf. *Texas v. McCullough*, 475 U.S. at 142 n.4.

defendant committed the crime shortly after he was released from prison); *Wasman v. United States*, 468 U.S. 559, 569-570 (1984) (the presumption can be rebutted by evidence that the defendant was convicted of another crime in the interim between the original and second sentencing proceedings); *Pearce*, 395 U.S. at 723, 726 (the presumption can be rebutted by evidence regarding events or the defendant's conduct after the initial sentencing proceeding). Because various types of evidence can shed light on the character of the offender as well as the crime, *McCullough*, 475 U.S. at 141-143, and since limiting the types of evidence that a trial judge may consider at resentencing would arbitrarily deny the judge valuable information about "the person as well as the crime," *Wasman*, 468 U.S. at 572, and lead to "bizarre" results in some cases, *McCullough*, 475 U.S. at 142, the Court has imposed only two requirements before a trial judge can increase a defendant's original sentence: *First*, the judge must base his reasons for an increased sentence on objective facts that were unknown to him at the first sentencing hearing, or that the judge demonstrably did not consider for a good reason that is no longer applicable. *Second*, the judge must place on the record his reasons for the increased sentence. See *McCullough*, 475 U.S. at 138-144; *Wasman*, 468 U.S. at 569-570, 571-572; *Pearce*, 395 U.S. at 726. Together, those requirements ensure that an increased sentence is not "motivated by vindictiveness on the part of the sentencing judge," the "evil" that due process seeks to prevent, *McCullough*, 475 U.S. at 137, 138, while also permitting a judge sufficient flexibility to impose a sentence that is appropriate to the defendant and to his crime.

Here, the trial judge placed on the record his reasons for the increased sentence, and those reasons were based on objective facts. The judge said that he did not know at the initial sentencing proceeding that respondent had raped and sodomized the victim numerous times on the night of the crimes, or that respondent had threatened the victim with his knife. J.A. 82. The judge also said that he considered respondent's "mental outlook" on the crimes as well as his testimony at trial, *id.*, neither of which the judge could have considered when respondent was first sentenced. Those reasons are clearly sufficient, because a trial judge may consider the aggravated nature of a defendant's actions and a defendant's perjury during trial as factors that justify an enhanced sentence.

Respondent argues that evidence of the facts and circumstances of the defendant's crime presented at a subsequent trial should never be allowed to rebut a presumption of vindictiveness. Resp. Br. 27-28, 32-37. That argument is without merit, for several reasons. To begin with, this Court expressly held in *Texas v. McCullough* that a trial judge may rely on evidence developed at a trial following the defendant's initial sentencing hearing (there, a retrial) as a basis for imposing an increased sentence. 475 U.S. at 143 (proof that the defendant, not his accomplices, had slashed the victim's throat). Moreover, the Court's holding was not limited, as respondent suggests, to cases in which a presumption of vindictiveness does not apply. Resp. Br. 35. While *McCullough* found it inappropriate to presume vindictiveness in that case, the Court also made clear that the facts developed

at the retrial "clearly constitute 'objective information . . . justifying the increased sentence.' " 475 U.S. at 143.[3]

Respondent's claim also lacks merit for another reason. His argument rests on the assumption that trial judges will defy the principle that a defendant may not be vindictively sentenced by trumping up reasons for an increased sentence based on the facts developed at a defendant's trial. Resp. Br. 35-36. In respondent's words, allowing the trial judge to increase a defendant's sentence based on evidence developed at a retrial "creates much too convenient a mechanism for masking a vindictive sentence" and will lead a judge to "substitute form for substance." Resp. Br. 36. Respondent, however, overlooks the requirement that a trial judge place on the record his reasons for the increased sentence, *Pearce*, 395 U.S. at 726, which enables an appellate court to determine whether the trial judge was in fact acting vindictively. Appellate courts are fully capable of performing that inquiry. Moreover, as the Court has noted, "[t]he integrity of the

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[3] There is also no merit to respondent's suggestion that the Court's ruling in *McCullough* is limited to cases in which there is also additional objective evidence from another source that also would justify an increased sentence. Resp. Br. 35. The additional objective information in *McCullough* to which respondent refers – the fact that McCullough committed the murder shortly after being released from prison – was a separate and independent justification for McCullough's increased sentence. 475 U.S. at 144 ("This new objective information *also* amply justified McCullough's increased sentence.") (emphasis added).

judges, and their fidelity to their oaths of office," ordinarily provides "adequate[] assurance" that their sentencing decisions are not based on impermissible factors. *Grayson*, 438 U.S. at 54.

Respondent claims that the trial judge's consideration of the facts of respondent's crimes as developed at trial amounts to improper reliance on subjective factors, not the objective facts required by *Pearce*. Resp. Br. 28-30. That argument is mistaken. *Pearce* requires a judge to rely on " 'objective information . . . justifying the increased sentence,' " *McCullough*, 475 U.S. at 142, quoting *Goodwin*, 457 U.S. at 374, but *Pearce* does not prohibit a judge from making the moral judgment that those objective facts enhance the defendant's blameworthiness. "It is entirely fitting for the moral, factual, and legal judgment of judges * * * to play a meaningful role in sentencing," *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (plurality opinion), and that is also true in resentencing. *McCullough*, 475 U.S. at 143-144. *Pearce* itself recognized that a judge may consider the defendant's " 'mental and moral propensities' " at resentencing, 395 U.S. at 723, quoting *Williams*, 337 U.S. at 245, and required only that the judge's "reasons must be *based upon* objective information," 395 U.S. at 726 (emphasis added). *Pearce* did not forbid a judge from reevaluating the heinousness of the crime or the dangerousness of the offender in light of that new information. And that is all that the trial judge did. J.A. 82, 88.[4]

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[4] Respondent argues that the trial court erred in finding that respondent threatened the victim with the knife. Resp. Br. 28. Respondent rests his argument on the victim's testimony that respondent said that he would not hurt her or her

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Respondent also argues that the trial judge's reasons do not justify increasing the sentence on respondent's burglary conviction, instead of his rape and sodomy convictions, because no new facts regarding the burglary were developed at trial. For that reason, according to respondent, even if the trial judge could increase the sentence on respondent's sexual assault convictions, the judge should not be allowed to increase the sentence on respondent's burglary conviction. Resp. Br. 30-32.[5] Respondent's argument misinterprets what is required to rebut a presumption of vindictiveness.

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children, and the victim's testimony that respondent once placed the knife in the victim's hand. Resp. Br. 28-29. Respondent, however, has not fully described the victim's testimony. Although the victim stated at one point that she saw the knife on the bed, R. 139, she also testified that respondent ran towards her with the knife in his hand, R. 134; that respondent held the knife against her chest, R. 139; that respondent always had at least one of his hands over the victim's hand when respondent placed the knife in the victim's hand, R. 139-140; and that the victim feared "[t]hat if [she] tried to hurt him with the knife that he would hurt [her] or go and hurt [her] children," R. 140. In sum, the evidence was more than ample to support the trial judge's finding that, during the hour when respondent repeatedly assaulted the victim, R. 129-142, 145-146, 162, respondent threatened the victim with his knife. Respondent's statement that he "denied being the attacker," Resp. Br. 29, also overlooks the fact that he told the police before trial that the victim consented to intercourse. R. 198, 202-205.

[5] What the trial court did in this case was to consider the evidence when crafting an overall sentence for respondent. That is a common sentencing practice in the state and federal courts. When defendants are convicted on multiple counts, trial judges routinely devise an overall sentence to fit the case,

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McCullough allows a trial judge to rely on objective facts learned after the defendant was initially sentenced as a basis for imposing an increased sentence. Those facts need not, however, be directly related to the particular crime for which the defendant is convicted. *McCullough* made clear that a defendant can receive an increased sentence if the trial judge learns that the defendant has a prior criminal record of which the judge was unaware when he initially sentenced the defendant. 475 U.S. at 141-142. *Wasman* held that a trial judge can rely on the fact that the defendant was convicted of another crime in the interim between the original and second sentencing hearings. 468 U.S. at 569-570. In both cases, the new facts may be considered because they are objective, even though they were not part of the proof of the offense for which the defendant was sentenced and are not directly related to that crime. That principle is fully applicable in

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then apportion that sentence over the various counts of conviction. See, *e.g.*, *United States v. Shue*, 825 F.2d 1111, 1114 (7th Cir.), cert. denied, 108 S.Ct. 351 (1987); *United States v. Busic*, 639 F.2d 940 (3d Cir.), cert. denied, 452 U.S. 918 (1981). That appears to have happened in this case. Respondent originally received concurrent 30-year terms of imprisonment on his burglary and rape convictions. J.A. 24. At resentencing, respondent received concurrent terms of life imprisonment on his burglary and sodomy convictions, and a consecutive 150-year sentence for rape. J.A. 83-85. Each sentence had different components and an overall penalty designed to ensure that respondent serves a particular term of years before he is released or becomes eligible for parole, what is known in the vernacular as a "sentencing package." *Shue*, 825 F.2d at 1114.

this case.[6] In any event, burglary under Alabama law consists in an unlawful entry of a dwelling with the intent to commit "a crime therein." *Ala. Code* § 13A-7-5 (1982). Thus, the facts of the "crime[s]" respondent committed after entering the victim's home directly bear on his culpability for burglary.

Finally, respondent attacks the trial judge for what respondent repeatedly calls "bias" or "partiality" on the judge's part, Resp. Br. 9, 19, 29, 30, 34, since the judge knew that respondent had already pleaded guilty and had written a letter to the judge confessing his guilt. Resp. Br. 29-30. Respondent's argument proves too much. Respondent's argument amounts to the proposition that the same trial judge can never impose a more onerous sentence once a defendant has withdrawn his guilty plea, which is just another way of saying that a presumption of vindictiveness can never be rebutted in any such instance. That conclusion is inconsistent with this Court's decisions.

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[6] Respondent's argument is also senseless from a policy standpoint. Suppose that respondent had assaulted not only the victim, but also her children. Respondent's position would prevent the trial judge from relying on that evidence, because it does not bear on his burglary conviction. No sensible policy is served by that rule. In fact, *McCullough* emphasized that a trial judge must be free to consider all relevant objective evidence, because it bears on the question whether the original sentence adequately serves the retributive and deterrent functions of criminal law. 475 U.S. at 142-143.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted,

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